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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1902. 1903.

CORPORATION OF SHEFFIELD *v.* BARCLAY AND OTHERS.

1902
Aug. 4, 5;
Oct. 27.

Indemnity—Forged Transfer of Stock—Innocent Presentment of, for Registration—Implied Contract to Indemnify.

T. and H. were the holders of certain stock of the plaintiff corporation. T. instructed a firm of stockbrokers to sell the stock, which they did. Before any transfer had been executed the purchasers pledged the stock with the defendants as security for an advance. A transfer purporting to be executed by both T. and H. in favour of the defendants was then handed to the defendants, who sent it to the plaintiffs for registration, and procured themselves to be registered as the holders. The defendants subsequently at the request of the pledgors transferred the stock to third parties, who in their turn were duly registered. Some time afterwards it was discovered that the signature of H. to the first-named transfer was a forgery, and upon an action being brought by him against the plaintiff corporation the latter were compelled to purchase stock to replace that which he had lost. The corporation then sued the defendants for an indemnity:—

Held, that the defendants in sending in the transfer to the plaintiffs for registration impliedly undertook to indemnify them against the consequences of registering it, and that, there being no negligence on either side, the loss must fall upon the defendants.

Judgment of Lindley J. in *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, dissented from.

TRIAL before Lord Alverstone C.J. without a jury.

In March, 1893, one Sutcliffe, who had been trustee of the estate of a Mrs. Braithwaite, retired from the trust, and A. A. Timbrell and A. O. Honnywill were appointed as new trustees in his place. On March 29, 1893, 8500*l*. 3½ per cent. irredeemable stock of the Sheffield Corporation, belonging to the trust estate, was transferred into the names of Timbrell and Honnywill, and they were duly registered as the holders of that stock in the plaintiff corporation's stock register. Timbrell shortly afterwards instructed Messrs. Steer, Lawford & Co., stockbrokers, to sell 8200*l*. of the said stock on the trustees' behalf; and on April 10, 1893, Steer, Lawford & Co. sold it to Wedd, Jefferson & Co., stock-jobbers, for the account of April 13. Wedd, Jefferson & Co., who did not resell the stock for that account, asked Steer, Lawford & Co. to procure them a loan on the security of the stock to enable them to pay the vendors. Steer, Lawford & Co., who were in the habit in the ordinary course of business of borrowing money from their bankers, the defendants Barclay & Co., against the floating security of various stocks from time to time deposited by them with the bank, arranged with the bank that the said Sheffield Corporation stock should be added to the floating security, and that the bank should advance the money required to pay Messrs. Timbrell and Honnywill. Steer, Lawford & Co. accordingly prepared a deed of transfer of the stock in favour of E. E. Barclay as representative of the bank, and sent it to Timbrell for execution, who returned it apparently duly executed and bearing what purported to be the signatures of A. A. Timbrell and A. O. Honnywill. That transfer was lodged with the defendant bank on April 11 by Steer, Lawford & Co., who with the money advanced by the bank paid the price of the stock to Timbrell on Wedd, Jefferson & Co.'s account. On April 15 the transfer was sent by the defendant bank to the plaintiffs with a covering letter in the following terms: "54, Lombard Street, London, E.C. 15th April, 1893.—Messrs. Barclay, Bevan, Ransom & Co. present their compliments to the registrar of the Sheffield Corporation, and beg to send enclosed the transfer of 8200*l*. 3½ per cent. 1883 stock, and will be obliged by his registering the same in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also enclose the amount of the registration fee.—The Registrar, Sheffield."

The usual notices of proposed transfer were sent by the plaintiffs to Timbrell and Honnywill, but from neither did the plaintiffs receive any reply. The plaintiffs accordingly registered Mr. E. E. Barclay as the holder of the stock, and on April 29 the new certificate was received by the bank. In the meantime Wedd, Jefferson & Co. had on April 26 sold 8000*l*. of the said stock to A. Young and J. J. Macdonald, and the abovementioned certificate was returned to the plaintiffs to await a transfer by E. E. Barclay to the purchasers. On May 12, 1893, Wedd, Jefferson & Co. sold the remaining 200*l*. of the stock to Mary F. Cockayne. And the said A. Young and J. J. Macdonald and Mary F. Cockayne were in due course respectively registered as the holders of the stock so purchased by them. In December, 1897, Timbrell died, and it was then discovered that what purported to be the signature of A. O. Honnywill to the deed of transfer of April 11, 1893, was a forgery. In April, 1900, an action was brought in the High Court by A. O. Honnywill against the Sheffield Corporation, claiming that the corporation should be ordered to rectify their register and insert therein his name as the holder of 8200*l*. of the 3½ per cent. stock, and to pay to him dividends which would have accrued from the said stock, together with interest thereon, upon the ground that the deed of transfer of April 11, 1893, was a forgery so far as it purported to be signed by him. By a letter dated December 13, 1900, the present defendants, Barclay & Co., agreed to be bound by the decision in the action of *Honnywill* v. *Sheffield Corporation* on the issue whether the signature of Honnywill to the deed of transfer was a forgery or not. At the trial the jury found that the signature was a forgery, and Honnywill recovered judgment, whereby it was ordered that the corporation should appropriate or purchase and register in the name of Honnywill 8200*l.* of the said stock, and should pay him a sum equal to the dividends which would have been payable upon the said stock together with interest. In compliance with the judgment the corporation purchased the said stock for the sum of 8645*l.* 10*s.*, and registered the same in Honnywill's name, and further paid to him a sum of 2524*l.* 1*s.* 2*d.* in respect of dividends and interest. On October 23, 1901, the Sheffield Corporation commenced the present action against E. E. Barclay and Barclay & Co., claiming an indemnity against the loss which the corporation had suffered.

Danckwerts, K.C., *Bankes, K.C.*, and *Waddy*, for the plaintiffs. The defendants are bound to indemnify the plaintiffs upon the ground that the plaintiffs, in registering the transfer to E. E. Barclay in April, 1893, did an act at the defendants' request which upon the face of it was lawful, and which has resulted in damage. For that proposition the plaintiffs rely upon the decision in *Dugdale* v. *Lovering*. (1) There the plaintiffs were in possession of certain trucks which were claimed by the defendant and also by third parties. The plaintiffs asked the defendant for an indemnity if they should deliver up the trucks to him. The defendant, without giving any answer as to the indemnity, required the plaintiffs to deliver the trucks to him, which they accordingly did. The third parties having subsequently, in an action against the plaintiffs for conversion, established their title to the trucks, the defendant was held liable upon an implied contract of indemnity to repay to the plaintiffs the money which they had been compelled to pay to the third parties. In *Adamson* v. *Jarvis* (2), where the plaintiff was an auctioneer who had sold certain cattle and other goods upon the defendant's instructions, and in *Humphrys* v. *Pratt* (3), where the plaintiff was a sheriff to whom the defendant had delivered a fi. fa., and who had executed it upon certain cattle pointed out to him by the defendant as being the property of the judgment debtor, the goods in each case having turned out to be the property of a third person who made the plaintiff responsible, it was held that the plaintiff was entitled to an indemnity from the defendant. The same principle was laid down in *Betts* v. *Gibbins* (1), which case is cited in *Toplis* v. *Grane* (2) by Tindal C.J. as establishing that "Where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

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(1) (1875) L. R. 10 C. P. 196. (2) (1827) 4 Bing. 66; 29 R. R. 503.
(3) (1831) 5 Bli. (N.S.) 154; 35 R. R. 41.

There is a strong analogy between the presenting of a transfer for registration and the giving of directions to a sheriff to levy execution upon particular goods as in *Humphrys* v. *Pratt* (3) In each case there is more than a mere demand that the corporation or sheriff shall do their duty: there is a demand that they shall do it in a particular way. If a fi. fa. is delivered to a sheriff without more and he levies on the wrong person's goods, there is no pretence for any indemnity from the judgment creditor; it is otherwise if the judgment creditor directed the levy to be made on those particular goods. But if the indicating of specific goods implies an undertaking to indemnify the sheriff if they turn out not to be the debtor's goods, why does not the indication to a company of a particular person as entitled to be registered equally imply an undertaking to indemnify the company if he turns out not to be so entitled? In *Carshore* v. *North Eastern Ry. Co.* (4) this point was left undecided. There stock of the defendant company belonging to the plaintiff had been transferred to a third party by means of a forged transfer, and the plaintiff

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(1) (1834) 2 A. & E. 57; 41 R. R. 381.

(2) (1839) 5 Bing. (N.C.) 636, at p. 650; 50 R. R. 814.

(3) 5 Bli. (N.S.) 154; 35 R. R. 41.

(4) (1885) 29 Ch. D. 344.

1902

SHEFFIELD CORPORATION v. BARCLAY.

brought an action against the company to have her name replaced on the register; the company obtained leave in the action to serve the third party with notice of a claim for indemnity, though the Court of Appeal expressly refrained from expressing any opinion as to whether the company had any right to be indemnified. In America this point has been expressly decided in favour of the plaintiffs' contention in *Boston and Albany Railroad Co.* v. *Richardson.* (1) There the facts were on all fours with the present case; and it was laid down by the Court that, "If one buys stock and takes a transfer and presents the certificate to the corporation and demands a new one, he thereby impliedly represents that he is entitled to the new certificate. He demands it as his right: this implies that he is the owner and has a right to it. The corporation has the right to understand him as asserting this. It is not bound to question or investigate the genuineness of the transfer, and see if the purchaser has not been defrauded. When the purchaser presents his transfer and certificate, the transfer officer naturally understands that he claims the transfer to be valid, and to have a right to a certificate; he has the right to act as if this had been said in terms. And if relying upon such tacit and implied representations, the corporation suffers a loss, the purchaser who misled it is liable." In that case the Court relied to some extent upon the analogies of a sale of personal chattels, the seller of which, as a general rule, impliedly warrants his title; of the sale of a promissory note, the seller of which impliedly warrants that the previous signatures are genuine; and of a person innocently representing himself to be the agent of another and obtaining money or goods on the credit of his supposed principal, in which case the professed agent is liable as on a warranty of authority.

It is the duty of the transferee of stock, and not the duty of the company, to ascertain the genuineness of the signatures to the transfer. It is true that in *Simm* v. *Anglo-American Telegraph Co.* (2) Lindley J. delivered a judgment which is adverse to the plaintiffs' present contention. There one Coates

(1) (1883) 135 Mass. 473.

(2) 5 Q. B. D. 188.

was the holder of stock of the defendant company. His clerk without his authority sold the stock to Spurling & Skinner, as trustees for Burge & Co., and forged Coates' signature to the transfer. The transfer was lodged with the defendants, who registered it. Spurling & Skinner, at Burge & Co.'s request, then transferred the stock to the plaintiff as security for a loan, and in due course the plaintiff was registered as the owner. The loan was subsequently paid off, but the stock remained standing in the plaintiff's name. Upon discovery of the forgery the company refused to recognise the plaintiff as owner of the stock, and claimed to remove his name from the register. The plaintiff then sued the company for the value of stock; and in a second action the company sued Spurling & Skinner for an indemnity. Lindley J. held that the plaintiff in the first action was entitled to recover upon the ground that he had acquired a good title to the stock by estoppel, and that that title was not affected by the subsequent repayment of the loan; and in the second action he held that the company had no right of indemnity against Spurling & Skinner upon the ground that there was a statutory duty on the company to keep their register correctly, and that Spurling & Skinner in presenting the transfer for registration represented nothing more than that so far as they knew it was a genuine document. On the case coming before the Court of Appeal the judgment of Lindley J. in the first action was reversed, so that it became unnecessary to decide whether Lindley J.'s judgment in the second action was correct, and no decision was given upon it. But the reasoning of the Court of Appeal in the first action was inconsistent with that of Lindley J. in the second. Bramwell L.J. there said (1): "It has been argued .... that the company were estopped because it was their duty to make inquiries, and because it must be taken against them that they were satisfied by the inquiries which they had instituted, and that they affirmed to Burge & Co., not merely that Coates had been a stockbroker, but also that he had executed the instrument of transfer. I dissent entirely from that argument. I believe that the system of inquiry by companies before the registration of a transfer is modern; no doubt that is a very reasonable and proper step for companies to take; nevertheless, as it seems to me, it is clearly a practice to which they have recourse for their own benefit, and not for the benefit of any one else." Therefore, the judgment of Lindley J. must be treated as practically overruled.

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(1) 5 Q. B. D. at p. 203.

By the Sheffield Corporation Act, 1883 (46 & 47 Vict. c. lvii.), under which this stock was issued, it is provided that where the corporation so resolve it shall be transferable by deed and not otherwise, and the corporation did so resolve in the case of this particular stock. Then s. 29, sub-s. 4, provides that "the deed of transfer when duly executed shall be delivered to and kept by the corporation or the registrar, and the corporation or the registrar shall enter a memorial thereof in a book to be called the register of transfers of corporation stock, and shall indorse on the deed of transfer a notice of that entry." The duty of the corporation, therefore, with respect to the registration of transfers is limited to cases in which the deed has been "duly executed," which the deed in the present case was not. It is to be observed that if the forgery had been discovered before the defendants had transferred the stock to their purchasers, the loss would have fallen upon the defendants; the plaintiffs would have been entitled to remove their name from the register without compensation, and it would be strange if the position of the defendants could be bettered by their transferring the stock over to other parties.

But the plaintiffs are also entitled to recover upon another ground. The defendants by presenting the forged transfer for registration impliedly warranted that they had the authority of the transferors. The defendants were acting pro hac vice in the nature of agents for Timbrell and Honnywill. If so, then the case falls within the doctrine in *Oliver* v. *Bank of England.* (1) In that case the Court of Appeal applied the doctrine of *Collen* v. *Wright* (2) to the case of a transfer of stock, and adopted the statement of the effect of *Collen* v. *Wright* (2) by Lord Esher in *Firbank's Executors* v. *Humphreys* (3): "The rule to be deduced is that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." It is true that in *Oliver* v. *Bank of England* (1) the transfer of the stock was under a power of attorney, and therefore the agency was more marked than in the present case. But one must look at the substance of the thing, and a principle which is held to apply where the transfer is under a power must equally apply where it is by an ordinary transfer deed.

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(1) [1902] 1 Ch. 610.
(2) (1857) 8 E. & B. 647.
(3) (1886) 18 Q. B. D. 54, at p. 60.

If that principle applies to this case, the plaintiffs' claim is not barred by the Statute of Limitations, for the cause of action for the breach of warranty does not arise till the damage accrues. This is shewn by the language of Lord Esher in the passage already cited from *Firbank's Executors* v. *Humphreys* (2), "to the injury of the person to whom it is made." Nor does the statute apply if the claim be based on the first ground, the implied contract of indemnity, for there also the cause of action does not arise till loss is incurred: *Tunstall* v. *Bartlett.* (3) [He also referred to *Brown* v. *Howard Fire Insurance Co.* (4)]

Haldane, K.C., and *F. R. Radcliffe*, for the defendants. As regards the first ground upon which the plaintiffs' claim is rested, that of implied contract of indemnity, the defendants rely upon the judgment of Lindley J. in *Simm* v. *Anglo-American Telegraph Co.* (5) That judgment has never been overruled. The Court of Appeal there expressly declined to decide the question raised in the second action. Even if Bramwell L.J. was right in saying that there was no obligation on the company to make inquiries with respect to the genuineness of the transfers, his view is not inconsistent with Lindley J.'s decision on the subject of indemnity. The

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(1) [1902] 1 Ch. 610.

(2) 18 Q. B. D. 54, at p. 60.

(3) (1866) 14 L. T. (N.S.) 400.

(4) (1875) 42 Maryland Rep. 384.

(5) 5 Q. B. D. 188.

Court of Appeal were only concerned to negative the estoppel against the company. The non-existence of a duty on the part of the company is consistent with there being also no duty on the party presenting the transfer. There may be no duty on either side. But if that be so, then the loss must remain where it falls. The decision in *Boston and Albany Railroad Co.* v. *Richardson* (1) did not proceed upon an implied undertaking to indemnify. The facts of that case were on all fours with those of *Oliver* v. *Bank of England* (2), the transfer was under a power of attorney, and the decision rested in the main upon the doctrine of *Collen* v. *Wright*. (3) It may be that that decision also to some extent proceeded upon the ground of deceit, although there was no suggestion of fraud. But if so, it can be of no authority in this country since the case of *Derry* v. *Peek*. (4) Further, the Court there relied upon the analogy of the implied warranty of title arising upon the sale of personal chattels; but whatever may be the rule on that subject in certain States of America, it is no part of the law of England that a seller of chattels impliedly warrants his title. If the contention of the plaintiffs is right, then there was no necessity in the case of *Oliver* v. *Bank of England* (2) to resort to a doubtful extension of the doctrine of *Collen* v. *Wright* (3); but it never occurred to any one in that case to rely upon an implied indemnity, nor was *Dugdale* v. *Lovering* (5) ever even referred to there. Again, how is it that this contention has not often been raised before? For the state of facts giving rise to the question must be one of very frequent occurrence; but except in the single case of *Simm* v. *Anglo-American Telegraph Co.* (6) the contention has never been raised in this country.

That it was the duty of the plaintiffs to make inquiries as to the genuineness of the signatures of the transferors appears from s. 30, sub-s. 1, of the Sheffield Corporation Act, 1883, which provides that "the corporation or the registrar before allowing any transfer of stock may, if the circumstances of the

(1) 135 Mass. 473.
(2) [1902] 1 Ch. 610.
(3) 8 E. & B. 647.
(4) (1889) 14 App. Cas. 337.
(5) L. R. 10 C. P. 196.
(6) 5 Q. B. D. 188.

case appear to them or him to make it expedient, require evidence of the title of any person claiming a right to make the transfer."

If the plaintiffs' claim be rested on the doctrine of *Collen* v. *Wright* (1) as to implied warranty of agency, there are two objections: in the first place, there was no relation of principal and agent between Honnywill and the defendants, so that the initial fact which is essential to make that doctrine applicable is wanting. It may be that a person who, as in *Oliver* v. *Bank of England* (2), produces a power of attorney to enable him to transfer an inscribed stock warrants that he has the authority of his principals, the transferors; but here there was no power of attorney. In the second place, even if the doctrine of *Collen* v. *Wright* (1) did apply, the action would be statute-barred; the cause of action accrued when the breach took place: *Short* v. *McCarthy*. (3)

Danckwerts, K.C., in reply.

Oct. 20. LORD ALVERSTONE C.J. delivered the following written judgment:—The question raised in this action is one of very great importance. The action was brought by the corporation of Sheffield against Messrs. Barclay & Co., the well-known bankers, to recover the amount of principal and interest of certain corporation stock which belonged to certain trustees named Timbrell and Honnywill, and was transferred to a nominee of the defendants under a transfer purporting to be executed by Honnywill, but which for the purpose of this action must be taken to have been a forgery. The facts may be very briefly stated. On March 29, 1893, 8500*l.* Sheffield Corporation redeemable stock was transferred to the names of A. A. Timbrell and A. O. Honnywill, who were trustees of a certain estate. The certificate of the stock in their names, bearing date April 13, 1893, was produced before me. The stock had stood in the name of Sutcliffe from 1896, but had been transferred on the change of trustees to Timbrell and Honnywill. On April 11, 1893, a transfer of 8200*l.* of this stock to

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(1) 8 E. & B. 647.

(2) [1902] 1 Ch. 610.

(3) (1820) 3 B. & A. 626, 631; 22 R. R. 503.

E. E. Barclay, a representative of the defendants, purporting to be executed by Timbrell and Honnywill, was handed to the defendants Barclay & Co. On April 15, 1893, the defendants sent the transfer of April 11 to the corporation with a letter in the following terms: [He read the letter above set out.] This was followed by a letter of April 17 from Mr. Parker, the registrar, acknowledging the receipt, but pointing out that the registration fee had not been inclosed, and on April 18 Barclay & Co. sent the registration fee. On April 28, 1893, E. E. Barclay, the transferee named in the transfer of April 11, executed a transfer of 8000*l.* of the stock to Messrs. Young and Macdonald, and upon May 12 a transfer of the balance of 200*l.* to Mary Florence Cockayne. Upon June 1 the plaintiffs issued certificates to Young and Macdonald for the 8000*l.* stock and to M. F. Cockayne for the 200*l.*

In the year 1900 an action was brought by Honnywill against the corporation claiming the rectification of the register by inserting his name as the holder of the 8200*l.* stock transferred to Barclay under the forged transfer, and the interest and dividends paid thereon. In that action the jury found that the transfer was a forgery, and had not been executed by Honnywill or with his authority, and for the purposes of this action it was agreed that the defendants were bound by that finding.

The duties of the corporation in respect of the transfer of stock are controlled by ss. 27–32 of the Sheffield Corporation Act, 1883. Reliance was placed by the plaintiffs upon the language of sub-s. 4 of s. 29, and by the defendants on sub-s. 1 of s. 30. There was no evidence before me either that the defendants or their agents, or the plaintiffs or their officials, were guilty of negligence, and I find as a fact that there was no negligence either on the part of the defendants or their agents, or on the part of the registrar or any official of the corporation.

Before considering whether any of the above-mentioned statutory provisions have any material bearing upon the case, I had better state my view of the law. The case for the plaintiffs was based on the following grounds, which appear to me to involve the same considerations, although possibly somewhat different arguments may be used with regard to each ground. It was said first that the plaintiffs had done a lawful act at the request of the defendants, which lawful act had caused the plaintiffs damage, and that therefore the defendants were liable for the damage so caused to the plaintiffs. It was further contended on behalf of the plaintiffs that, even if the defendants were not liable because the plaintiffs had done an act at their request, the sending in of the transfer implied an undertaking by the defendants to indemnify the plaintiffs, or was a warranty by the defendants that the transferor had a right to transfer. As I have already said, it does not seem to me that the particular form in which the plaintiffs' claim is alleged is of much importance in solving the question which has to be decided. The real question—and it is to my mind one of the greatest difficulty—is what is the true nature of the request or representation, either made in fact or implied in law, from the act of sending in a transfer to be registered, or what is the nature of the transaction between the parties, and on whom should the loss fall as between two innocent parties if it turns out that the transfer is forged. The plaintiffs relied strongly on the enunciation of the law contained in the judgment of Tindal C.J. in *Toplis* v. *Grane* (1), and cited with approval by Lord Esher in *Dugdale* v. *Lovering* (2), to the effect that " where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." As I ventured to point out in the course of the argument before me, there are undoubtedly cases in which our law recognises that a request so acted upon does involve the party making the request in the obligation to indemnify the party who so acted. Such cases arise in connection with warranty of agency, representations made with regard to the custody of goods, and no doubt other instances might be given.

(1) 5 Bing. N. C. 636; 50 R. R. 814.

(2) L. R. 10 C. P. 196.

The difficult in this case is to decide whether the representations made or implied by the sending of a transfer do or do not fall within the rule enunciated by Tindal C.J. in *Toplis* v. *Grane.* (1)

For the defendants great reliance was very naturally placed upon the judgment of Lord Lindley (then Lindley J.) in the case of *Simm* v. *Anglo-American Telegraph Co.* (2) I have felt very much pressed by that opinion. It is that of a learned judge of very great experience in this branch of the law. That the bearing of the opinion of Lord Lindley may be understood, it will be convenient to make a brief statement of the facts which arose in *Simm* v. *Anglo-American Telegraph Co.* (2) In that case a firm of the name of Burge, who stood in a position corresponding to that of Barclay & Co., presented to the telegraph company, through Messrs. Spurling & Skinner acting on their behalf, a transfer purporting to be executed by one Coates, which was in truth a forgery. This transfer was registered by the company, and the stock was transferred into the names of Spurling & Skinner, who were in fact agents for Burge. The certificate of the stock, though prepared, had never been issued to Spurling & Skinner; so that, as was pointed out by the Court of Appeal, no question of estoppel by the issue of the certificate arose as in the cases of *In re Bahia and San Francisco Ry. Co.* (3) and *Hart* v. *Frontino, &c., Gold Mining Co.* (4) Before the case went to the Court of Appeal Burge & Co. were joined as plaintiffs, so that the question whether they could demand the issue of a certificate was raised as between them and the Anglo-American Telegraph Company. The other plaintiffs in the first action, Messrs. Simm and others, had purchased the stock from Burge & Co., and claimed that Burge & Co. should be registered as the holders. The other action was brought by the company against Spurling & Skinner, who had acted as agents for Burge in handing in the forged transfer, for an indemnity. Upon these facts the opinion of Lord Lindley was expressed in the following terms: "And it appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stock or shares standing in the names of persons on the register; and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this, that there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall upon the company. . . . The utmost which the company are entitled to say is this, 'It was your duty not to produce to us to be acted upon any transfer which you knew or suspected to have been forged.' I think the duty of the persons bringing the transfer does not go beyond this. Can the claim against Skinner & Spurling be sustained by looking at it from what I call a broader point of view? The first of these actions is brought against the company, and the second is in reality brought against Burge & Co.; can it be said, even if the question be looked at as between Burge & Co. on the one side and the company on the other, that the loss ought to fall on Burge & Co. rather than on the company? I do not think it can. It appears to me that the case is analogous to the case of a forged cheque, and as a banker paying a forged cheque to an innocent holder for value cannot recover back its amount and is compelled to pay it twice over, so here the company must pay the amount of the stock twice over. The duty being cast upon the company to look after the register and the transfers, it appears to me that between two innocent parties the company are not entitled to claim compensation from Burge & Co., nor to resist at Burge & Co.'s expense the recognition of that title which they themselves have created by their own act. It appears to me that Burge & Co. are entitled to say, 'We did not deceive you; you made inquiries and you accepted us as stockholders and put us on the register, and you cannot now turn round and say that as between you and us we do not hold that position which you have led us to believe that we are entitled to.'" This is no doubt a very strong opinion and a very clearly expressed view. It proceeds from one of the most able and distinguished judges that has ever adorned the English bench. If I had thought that that opinion had been delivered after full consideration of the point raised before me, and if it had not been the subject of further examination in the Court of Appeal, I should have felt bound by that decision, and I need scarcely say that in differing from it, as I feel bound to do, I do so with the very greatest diffidence and hesitation. When the case of *Simm* v. *Anglo-American Telegraph Co.* (1) was considered in the Court of Appeal, the particular judgment in which that opinion was delivered was not reviewed. The action by the Anglo-American Telegraph Company was against Spurling, an agent of a person who stood in the position of Messrs. Barclay in this case. When, therefore, that case came to be considered in the Court of Appeal, inasmuch as the decision was in favour of the company as against Burge & Co., the persons on whose behalf the forged transfer, purporting to be executed by Coates, had been presented, the company did not press their appeal in the action they had brought against Spurling, and Bramwell L.J. (2), dealing with that action, said: "I wish it to be distinctly understood that I do not express any opinion whether the second action would have been maintainable if any damage had accrued to the company; cogent arguments no doubt may be adduced in favour of either view; but the company are willing to pay the costs of the action brought by them rather than have a doubtful question discussed, and they are content that judgment be recorded against them, although technically they do not consent to it so as to preclude themselves from appealing, if it is wished to take the opinion of a higher tribunal." And the other Lords Justices expressed no opinion. I have, however, to consider how far the decision in *Simm's Case* (1), in the action brought by Simm against the company, supports the plaintiffs' claim in this case, or affords ground for questioning the principle of the decision given by Lord Lindley. It seems to me that the decision of the Court of Appeal did

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(1) 5 Bing. N. C. 636; 50 R. R. 814.
(2) 5 Q. B. D. 188.
(3) (1868) L. R. 3 Q. B. 584.
(4) (1870) L. R. 5 Ex. 111.

(1) 5 Q. B. D. 188.

(2) 5 Q. B. D. at p. 205.

decide that, as between two innocent parties, one of whom had innocently and without negligence handed in a forged transfer, upon which forged transfer the company were asked to act, the loss was to fall upon the person who handed in the transfer, or, in other words, they brought that case within the rule to which I have referred—that where one of two innocent parties must suffer, the party who has innocently put forward the request upon which the other one has acted must bear the burden. If I am right in this view, then the opinion of Lord Lindley does not solve the question in this case, because he did not consider the case from the point of view of deciding which of two innocent parties must suffer the loss occasioned by the act done. It is to be noted in this case, as pointed out by Mr. Bankes in the course of his argument, that the damage occasioned to the defendant was not damage caused so much by the forged transfer having been sent in as by the defendants having themselves acted upon it and sent in the subsequent transfers to Young and Macdonald and to Cockayne. *Simm's Case* (1) decides that Messrs. Barclay could not have claimed to be registered (see the judgment of Bramwell L.J. (2)); so that the company were not estopped from denying that Messrs. Barclay were tranferees until they had issued fresh certificates to Young and Macdonald and Cockayne: see *In re Bahia and San Francisco Ry. Co.* (3) and *Hart* v. *Frontino, &c., Gold Mining Co.* (4) I therefore come to the conclusion that in this case, as between the two innocent persons, the plaintiffs and the defendants, the loss should be borne by the defendants, who innocently caused the plaintiffs to act upon an instrument which turned out to be invalid.

Reliance was placed by Mr. Danckwerts upon the terms of the letter of April 15. In my opinion the express terms of that letter do not afford any special ground on which the plaintiffs can rely. It seems to me no more than an ordinary request to register; and in the same way the expression "duly executed" in s. 29, sub-s. 4, of the Sheffield Corporation Act does not carry the case any further. With regard to s. 30,

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(1) 5 Q. B. D. 188.

(2) 5 Q. B. D. at p. 203.

(3) L. R. 3 Q. B. 584.

(4) L. R. 5 Ex. 111.

1902

SHEFFIELD CORPORATION v. BARCLAY.

Lord Alverstone C.J.

sub-s. 1, relied upon by Mr. Haldane, I do not think it affords the defendants any defence for the reasons given, and except as bearing on the question of negligence that section does not seem to me to affect the point which I have to decide.

My attention was called by Mr. Danckwerts to two American cases—*Boston and Albany Railroad Co.* v. *Richardson* (1) and *Brown* v. *Howard Fire Insurance Co.* (2) The first of these cases is an undoubted decision in favour of the view presented by the plaintiffs; but I have not sufficient information as to the American law to say whether it is a direct authority, because it may be that the law as to innocent misrepresentation laid down by the House of Lords in *Derry* v. *Peek* (3) does not apply in the State of Massachusetts. The case of *Oliver* v. *Bank of England* (4) does not appear to me to afford me much assistance. That case was based entirely upon implied warranty, and the rule in *Collen* v. *Wright* (5) is undoubtedly left untouched by *Derry* v. *Peek*. (3) Speaking for myself, I should not have decided in favour of the plaintiff if it had been necessary to rely upon the doctrine of *Collen* v. *Wright*. (5) For the above reasons my judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *R. F. & C. L. Smith, for H. Sayer, Sheffield.*

Solicitors for defendants: *Maples, Teesdale & Co.*

(1) 135 Mass. 473.
(2) 42 Maryland Rep. 384.
(3) 14 App. Cas. 337.
(4) [1902] 1 Ch. 610.
(5) 8 E. & B. 647.

J. F. C.

THE GUARDIANS OF THE POOR OF THE ORMSKIRK UNION, APPELLANTS *v.* THE GUARDIANS OF THE POOR OF THE CHORLTON UNION, RESPONDENTS.

1902
Oct. 27.

Poor Law — Settlement — Irremovability — Residence —" Hospital" — Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1.

An institution partially endowed by a private person and founded with the object of providing a home and medical treatment, together with suitable employment and recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within the proviso to s. 1 of the Poor Removal Act, 1846.

SPECIAL CASE stated by consent and by order of a judge in pursuance of 12 & 13 Vict. c. 45, s. 11.

On January 10, 1902, the respondents obtained an order of two justices of the peace in and for the city of Manchester adjudging the settlement of Harold Coxon, a pauper, to be in the township of Maghull, in the appellant union.

On February 8, 1902, the appellants gave notice of appeal against the order to the general quarter sessions of the peace for the city of Manchester, and the appeal was at the said quarter sessions entered and respited.

Coxon was about twenty-four years of age, and was admitted as a patient into an institution called the Home for Epileptics at Maghull on April 4, 1893, suffering from the disease of epilepsy, for the purpose of receiving care and treatment, and, if possible, of obtaining a cure of such disease, and he remained, continuously receiving care and treatment in the home from the date of his admission until January 8, 1902, when he was discharged as incurable. Thereupon he became an inmate of the workhouse of the respondents. Whilst Coxon was in the home his relations paid 7*s.* 6*d.* a week for his maintenance and treatment therein.

Coxon never resided or dwelt in the appellant union for any period of time whatever during which he could acquire a settlement therein except during the period and for the purpose above mentioned.

1902

ORMSKIRK UNION v. CHORLTON UNION.

The Home for Epileptics was established in 1888 by Henry Cox, deceased, of Liverpool, and was partially endowed by him with the sum of 2000*l*. It consisted of buildings, farm buildings, and five acres of land farmed by the committee which governed the home. It was supported by donations, annual subscriptions, and payments made on behalf of the patients under care and treatment therein. Its object was the care and treatment of persons suffering from the disease of epilepsy.

The home was situate at Maghull, a village in the country about seven miles from Liverpool. The site was chosen so as to permit the patients to have the benefit of the hospital treatment in combination with healthy outdoor life, regular habits, suitable employment, and recreation. There was attached to the home a medical staff, a lady superintendent, three matrons, and twelve nurses.

The number of patients on December 31, 1901, receiving care and treatment for the disease of epilepsy was 123.

Annexed to the case was a pamphlet relating to the history and constitution of the home and the annual report and balance-sheet for 1901. It was stated in the pamphlet that it was considered necessary that each patient should be paid for, so as to make the institution as far as possible self-supporting. The patients were, therefore, divided into three classes, paying two guineas, one guinea, and 7*s*. 6*d*. a week respectively, with the intention that while the third class of patients paid only for their food, the charge for the first and second class would leave a profit to defray the expenses of the establishment, nursing, &c. It appeared from the balance-sheet for 1901 that the income of the institution was 5075*l*., of which 4157*l*. was derived from payments by patients, and 238*l*. from donations and subscriptions.

The appellants asserted and the respondents denied that the home was a hospital within the meaning of s. 1 of the Poor Removal Act, 1846 (1), and that during the time Coxon resided in the home he was confined as a patient in a hospital, so that the residence was not computable for settlement purposes.

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(1) The Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1: "No person shall be removed nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (reduced to one year by 28 & 29 Vict. c. 79) next before the

The question for the opinion of the Court was whether or not, on the facts above set out, Coxon acquired a legal settlement in the township of Maghull aforesaid, under the provisions of s. 1 of the Poor Removal Act, 1846, and s. 34 of the Divided Parishes Act, 1876 (1), by reason of his continuous residence for three consecutive years and upwards in the Home for Epileptics. If the Court should be of opinion in the affirmative, the order of the justices was to stand; otherwise the same was to be quashed.

T. F. Byrne, for the appellants. The question in the case turns on whether this Home for Epileptics is a hospital within s. 1 of the Poor Removal Act, 1846. If it is, then the period during which the pauper resided there does not count for the purpose of rendering him irremovable, and consequently he acquired no settlement in the appellant union. The term "hospital" is not defined in this Act, and there is no authority on the point; but it is submitted that a hospital includes any institution in which sick persons are received for the purpose of treatment. This institution is clearly within that definition. It was founded for the purpose of treating a particular disease, and it is none the less a hospital because it is partially, or even mainly, supported by payments by the patients. It is notorious that many

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application for the warrant: Provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned. . . ."

(1) The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; . . . ."

hospitals, using the word in the most limited sense, receive paying patients.

Brooke Little, for the respondents. In order that an institution can be a hospital within this section, it must fulfil two conditions. Its main object must be to provide medical treatment, and the greater part of the work must be done gratuitously. This home falls within neither branch of this definition. The fact that in this Act hospitals are grouped with places like prisons, barracks, and lunatic asylums shews that the reason of the Legislature in excluding residence in the places specified was that residence in them was involuntary. If it had been intended to include an institution like this home, residence in which is entirely voluntary, and is moreover paid for by the inmates, very different language would have been used. [He referred to *St. Olave's Union* v. *Canterbury Union.* (1)]

LORD ALVERSTONE C.J. This case raises an important point, and one which in the absence of authority must be decided on principle. The question is whether the pauper has acquired a legal settlement in the appellant union by reason of his having resided in that union. The answer to that question depends on s. 1 of the Poor Removal Act, 1846, which, stated shortly, provides that the time during which a person resides in certain institutions, such as a prison, a lunatic asylum, or a hospital, shall be excluded from the computation of the period of residence which renders a person irremovable. I do not think that one can state exhaustively the reasons for this provision, but the section seems to contemplate an exemption, from the consequences of the ordinary rule, of that kind of residence which does not depend on the will of the person, and which causes him to reside in a particular place for a particular purpose. I think that the intention of the section was to include, amongst other places, institutions to which persons go for the purpose of medical or quasi-medical treatment, and which are in popular language called hospitals, and in my opinion this institution comes within the term "hospital." I was at first inclined to doubt whether a distinction ought not to be drawn between hospitals in the ordinary sense of the word and institutions where the bulk of the patients pay for the treatment which they receive; but one cannot but be aware that there are many undoubted hospitals in which paying patients are received, and I think that it would be drawing too narrow a distinction to say that the mere fact that payments are made by patients is sufficient to prevent an institution of the kind in question from being a hospital within the meaning of this section. I do not think that in legislation of this nature too narrow a construction ought to be put upon the word "hospital." For these reasons I think that there were no grounds for the order for the removal of this pauper to the appellant union, and the appeal will therefore be allowed.

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(1) [1897] 1 Q. B. 438.

WILLS J. I am of the same opinion, and entirely concur in what my Lord has said. The section, in my opinion, points to a kind of residence entirely different from that of a man who is pursuing the ordinary course of life and one which is imposed upon the subject of it either by the will of others or by the necessities of sickness; nor, in my opinion, is a hospital the less one because some patients may make payments. It would be placing a great burden upon parishes in which institutions such as these are situated if the residence of patients in them were to have the effect of making the parish liable to support them.

CHANNELL J. I am of the same opinion.

Appeal allowed.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Alfred Dickinson, Ormskirk.*

Solicitors for respondents: *Gibson & Weldon, for J. H. Wild, Manchester.*

F. O. R.

1902
Oct. 29.

McNAIR, Appellant *v.* CAVE, Respondent.

Adulteration — Milk — Inspector of Nuisances — Powers — Sample procured outside Inspector's District—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

The power conferred upon an inspector of nuisances under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, to procure at the place of delivery a sample of milk in course of delivery to the purchaser in pursuance of a contract of sale cannot be exercised by an inspector outside the district for which he is appointed.

Case stated by a metropolitan magistrate.

An information was preferred by the appellant against the respondent under the Sale of Food and Drugs Acts, 1875 and 1879, for that on March 8, 1902, at the Midland Railway Company's Depot, Euston Road, in the borough of St. Pancras, the appellant did procure at the place of delivery a sample of certain milk in course of delivery by the respondent to the purchaser or consignee in pursuance of a contract for the sale to such purchaser, and that, suspecting the same to have been sold contrary to the provisions of the Sale of Food and Drugs Act, 1875, the appellant did submit the same to be analyzed, when the sample was found to have been sold by the respondent contrary to the provisions of the statute—that is to say, the same was sold by him to the prejudice of the purchaser, inasmuch as it had been adulterated by the admixture of water to the extent of 21 per cent. over and above the normal quantity, so that the same was not of the nature, substance, and quality of the article demanded by the purchaser.

On the hearing of the information the following facts were proved. The appellant was a sanitary inspector appointed for the city of Westminster, and the respondent was a farmer at Shottle Belper, in the county of Derby. A contract had been entered into between the respondent and a firm of dairymen, carrying on business in Westminster, whereby the respondent agreed to deliver to the firm at the Midland Railway Station, St. Pancras, twelve barn gallons of new, pure, and unskimmed milk daily.

The appellant, acting under the directions of the council of the city of Westminster, and in pursuance of the provisions of s. 3 of the Sale of Food and Drugs Act, 1879 (1), procured without payment a sample of milk from that supplied under the contract at the Midland Railway Station, in the borough of St. Pancras, being the place of delivery under the contract.

The appellant, suspecting that the milk was sold contrary to the provisions of the Sale of Food and Drugs Act, 1875, duly divided the sample into three portions, one of which was submitted to the public analyst of the city of Westminster for analysis. The certificate of the analyst stated that the sample contained 21 per cent. of added water.

On the part of the appellant it was contended that on the evidence of the certificate the offence charged had been committed by the respondent.

On the part of the respondent, the admission of the certificate as evidence was objected to, and it was contended that the inspector for Westminster had no power to procure a sample outside the district for which he was appointed, and, therefore, had no legal power to go into the borough of St. Pancras and take the sample, and also that the analyst appointed for the city of Westminster had no legal power to analyze the sample and to give a certificate which would be evidence, and that the place of delivery being in the borough of St. Pancras and outside the city of Westminster, the proceedings and certificate were nugatory and in violation of the

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(1) By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), "Any . . . . inspector of nuisances . . . . under the direction and at the cost of the local authority appointing such inspector . . . . or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such . . . . inspector . . . . if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analyzed and the same shall be analyzed, and proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if such . . . . inspector . . . . had purchased the same from the seller or consignor under s. 13 of the principal Act."

Sale of Food and Drugs Acts, the inspector and analyst being appointed only to act in respect of samples taken within the city of Westminster, and having power under the Acts to deal only with articles sold or procured within their own district; and in the case of the delivery in question a St. Pancras inspector was the proper person to procure the sample, and the St. Pancras analyst should have analyzed it.

The magistrate dismissed the information on the grounds put forward by the respondent.

The question for the opinion of the Court was whether upon the above facts the magistrate came to a correct determination and decision in point of law.

Avory, K.C., and *Bartley*, for the appellant. The question is whether an inspector acting under s. 3 of the Sale of Food and Drugs Act, 1879, has power to procure a sample of milk at a place outside his own district, and whether the certificate of an analyst who is not appointed for the district in which the sample was obtained is in such a case evidence of the offence. There can be no question but that in the present case an offence had been committed in the St. Pancras district, and that the magistrate had jurisdiction to deal with it, and if the certificate of the Westminster analyst was evidence the offence was proved. It is really immaterial to consider whether the Westminster inspector had power to take the sample: his doing so was merely a matter of procedure; a private person who had obtained a sample might prosecute if he chose. The certificate of the analyst is by s. 21 of the Act of 1875 made sufficient evidence of the facts stated in it, unless the defendant requires the analyst to be called as a witness. He did not so require in this case, and the offence was, therefore, as fully proved as it would have been if the analyst had given evidence in person. Secondly, it is submitted that under s. 3 of the Act of 1879 an inspector can take a sample outside his own district. No doubt under s. 10 of the Act of 1875 an analyst is appointed to act for a particular district; and it may be that in cases under that Act an inspector also cannot go outside his own district, though s. 13 does appear to contemplate cases where the inspector has taken action outside his district; but the very object of the Act of 1879 was to extend the powers of inspectors. Under the earlier Act there could only be an offence where there had been a sale; under s. 3 of the Act of 1879 a sample may be procured without payment at the place of delivery, which may not, and in the case of London most probably will not, be in the same district as the retail sale to the consumer, the intention of the Act being to reach wholesale dealers sending milk from a distance. The section contains no limitation except that the delivery must be in pursuance of a contract for sale, and it is difficult to see for what reason the section is wanted if the place of delivery must be within the inspector's district in order to justify his taking of a sample. [*Rouch* v. *Hall* (1) was referred to.]

Morton Smith, for the respondent. There is no offence under s. 3 unless all the formalities of the section have been complied with. A private person could not prosecute under that section. The only extension of powers given by s. 3 is that, whereas previously there could only be a prosecution after a sale, this section gives power to the persons named to procure a sample without payment and to prosecute as if there had been a sale. It is clear that under the Act of 1875 an inspector could only act in the district for which he was appointed: see *Reg*. v. *Smith* (2); and if it had been intended to give by the Act of 1879 such a large extension of powers as is contended for by the appellant, that intention would have been expressed in plain language. The consequence of adopting the appellant's contention would be that an inspector for, say, Westminster, would be at liberty to roam all over England, taking samples anywhere he pleased. A Westminster inspector is not "charged with the execution" of the Act of 1879 in any place but Westminster. The argument that, unless an inspector can act outside his district the section is unnecessary, is not sound, because where the place of delivery under a contract is in the same district as the intended place of sale by the retailer, there would previously to the Act of 1879 have been no power for an inspector to procure a sample without

(1) (1880) 6 Q. B. D. 17.

(2) [1896] 1 Q. B. 596.

payment before the milk had been delivered to the retailer. [He cited *Harris* v. *Williams*. (1)]

Bartley, in reply. In *Reg.* v. *Smith* (2) Hawkins J. was only dealing with the Act of 1875, and the decision is no authority as to the effect of the Act of 1879. Before an inspector can put s. 3 into operation he must first know of a contract, and secondly of the place of delivery under such contract; and the inspector of the district where the purchaser resides is more likely to have that knowledge than the inspector of any other district. The balance of convenience is, therefore, in favour of the appellant's contention.

Lord Alverstone C.J. This case is not free from difficulty; but the point is a narrow one, namely, what are the extended powers given to sanitary inspectors under s. 3 of the Sale of Food and Drugs Act, 1879? I think it is clear that under the earlier Act of 1875 both analysts and inspectors were only authorized to act in the district for which they were appointed. Sect. 13 of the Act of 1875 did at first strike me as indicating that under that Act an inspector might act outside his own district, because the section provides that the inspector shall submit the sample to the analyst of the district for which he acts; but on consideration I think that that is an incorrect inference, because the section goes on to say that, if there is no analyst appointed for the inspector's district, the sample may be submitted to the analyst of another place, and, therefore, I do not think that any argument as to the power of an inspector to act outside his own district can be founded on that section.

Now, no doubt s. 3 of the Act of 1879 does give an important increase to the powers of inspectors. Under the earlier Act there must have been a sale, and it was necessary that the sample should have been taken at the time of the sale. Under the Act of 1879 an inspector "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk." I am

(1) (1889) 6 Times L. R. 47.

(2) [1896] 1 Q. B. 596.

1902

McNair
v.
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Lord Alverstone C.J.

not much pressed by the somewhat extravagant suggestions made by Mr. Morton Smith as to the consequences that would follow from adopting the appellant's construction of the Act, because the section contains words of limitation, namely, that the milk from which the sample is taken must be in course of delivery in pursuance of a contract for sale, and the sample must be taken at the place of delivery under such contract; and if it be assumed, as I assume, that the intention was that an inspector should only procure a sample of milk which was either being sold or was going to be sold in his own district, these words limit the possibility of an inspector taking a sample from any milk on a mere allegation that it might eventually be sold in his district. But I think s. 3 is required in the case of an inspector acting only in his own district in order to remedy the defect which formerly existed of only being able to obtain a sample by purchase from the retailer. Accordingly the words "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser" are introduced in order to enable the inspector for the district to take a sample at an earlier stage of the transaction, and thus institute a prosecution in the first instance against the real wrongdoer. I agree that if this particular question of an inspector procuring a sample at a place of delivery outside his district had been thought of, it might have been desirable to deal with the common case of milk being delivered at a railway station in one district and intended to be sold in another district. But, having regard to the previous legislation and to the fact that under the earlier Act it is clear that inspectors could only act locally, I think that, if it had been intended to give to inspectors for one district power to procure samples in another district, different language would have been used; and I am unable to say that by the mere use of the words "place of delivery" (which, as I have pointed out, are required for another purpose) power is impliedly given to inspectors to go to any place of delivery under a contract whether it is within their district or not. I think express language would be required to give such powers; and in the absence of any express language I feel bound, somewhat reluctantly, to come to the conclusion that the decision of the magistrate was right, and that this appeal must be dismissed.

Wills and Channell JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Allen & Son.*
Solicitors for respondent: *J. B. Ricketts & Son.*

F. O. R.

1902
Nov. 3.

TROMANS *v.* HODKINSON.

Gaming—Place used for Betting—Bar of Public-house—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

The appellant, who was a bookmaker, was in the habit of frequenting the bar of an inn at certain hours for the purpose of carrying on a business of ready-money betting with persons resorting thereto, and the fact of his carrying on that business in the bar was known to those persons. He carried on the business there by the permission of the landlord, but he did not for the purposes of it occupy any specific portion of the bar:—

Held, that the above facts amounted to a "use" of the bar by the appellant for the purposes of betting in contravention of s. 3 of the Betting Act, 1853.

Belton v. *Busby*, [1899] 2 Q. B. 380, followed.

Case stated by justices of Staffordshire.

Informations were preferred against the appellant for having on certain specified dates unlawfully used the Railway Inn, Cradley Heath, for the purpose of betting with persons resorting thereto contrary to s. 3 of the Betting Act, 1853 (16 & 17 Vict. c. 119). The evidence shewed and the justices found that the appellant, who carried on the business of a ready-money bookmaker, was in the habit of frequenting the bar or taproom of the said inn for the purpose of there carrying on, and that he carried on in the bar or taproom at stated hours, a ready-money betting business with persons resorting thereto, the carrying on of which in the said bar or taproom was known to such persons, and pursued under some arrangement or undertaking come to with the landlord of the inn. There was no evidence that the appellant when at the inn obtained refreshments or used the house for that purpose or was a customer thereof, nor did it appear that the appellant had any interest in the inn or the business of the inn, or that he had any control over or took any part of the management of the inn, or that in the betting business carried on in the bar or taproom he occupied any specific part of the said bar or taproom. On behalf of the appellant it was contended that the bar or taproom was not a "place" within the meaning of the Betting Act, 1853, and that the use of the bar or taproom by the appellant was not a "use" by him thereof for the purpose of betting with persons resorting thereto within the meaning of the said Act.

The justices held on the authority of *Belton* v. *Busby* (1) that the bar was a "place," and that the appellant's actions amounted to a "use" of the same, and they convicted the appellant subject to a case for the opinion of the Court.

G. W. Stutfield, for the appellant. It is not disputed that the bar was a place within the meaning of the Act, but there was no evidence that the appellant "used" it for the prohibited purposes. *Belton* v. *Busby* (1) is admittedly a direct authority against the appellant's contention, but that case, in which the betting-man was not represented by counsel on the appeal, was wrongly decided. It is in direct conflict with the language of Lord Halsbury in *Powell* v. *Kempton Park Racecourse Co.* (2) with reference to the meaning of the word "use" in the Act. "It is not," he said, "the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto." The mere fact that a betting-man carries on his business in the public bar of an inn by the leave and licence of the publican does not amount to a "use" of the bar for that purpose, for he has not got the necessary "dominion and control over the place." There was nothing to shew that the landlord in the present case gave the appellant an exclusive licence to bet in the bar, or that if any other bookmaker had attempted to carry on a similar business there he would have interfered to prevent him. Nor does the fact of the appellant's carrying on of his business in the bar habitually affect the question. It is, as Lord Halsbury pointed out, not the repeated as distinguished from the casual and infrequent use that is material. There must be a possession or control of the premises or of some part of them. It might be that if the appellant had been allotted a specific part of the room in which to carry on his business he would have been liable to be convicted; but the evidence shewed that he was not.

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(1) [1899] 2 Q. B. 380.

(2) [1899] A. C. 143, at p. 160.

Shakespeare, for the respondent, was not called upon.

LORD ALVERSTONE C.J. I am of opinion that this conviction must be affirmed. It was contended that because the appellant had no interest in the inn or control over the premises he did not "use" the bar in the sense in which that term is employed in the section. With that contention I cannot agree. Apart from the decision in *Belton* v. *Busby* (1), I think that where you find a man habitually frequenting the same room or place for the purpose of carrying on there a regular business of betting with the persons resorting thereto he commits an offence against the Act. There is, to my mind, nothing in Lord Halsbury's judgment in *Powell* v. *Kempton Park Racecourse Co.* (2) to support the contrary. But, further, the decision of the Divisional Court in the later case of *Belton* v. *Busby* (1), which proceeded upon facts almost identical with those in the present case, is a direct authority in favour of the view we take.

WILLS J. I am of the same opinion. I entirely agree with the decision in *Belton* v. *Busby*. (1) I should add, however, that, in my opinion, the fact that the appellant took no refreshment in the inn was an immaterial circumstance. He would,

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(1) [1899] 2 Q. B. 380.

(2) [1899] A. C. 143, at p. 160.

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to my mind, have equally used the house in contravention of the Act if he had taken any.

CHANNELL J. I agree. The facts shew that the appellant used the bar as his betting office; but, if so, the conviction does not in any way conflict with the decision in the *Kempton Park Case.* (1)

Appeal dismissed.

Solicitors for appellant: *Philip Baker & Co., Birmingham.*

Solicitors for respondent: *Wainwright & Co., for Thomas Cooksey, Old Hill, Stafford.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1902
Oct. 31.

In re SMITH.
Ex parte DURBAN.

Bankruptcy—Bankruptcy Notice—Security given to Satisfaction of Creditor—Right of Creditor to issue fresh Bankruptcy Notice—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice was on January 22, 1902, served by a judgment creditor for 2129*l.* on the debtor. On January 28 an agreement was entered into between the creditor and the debtor that the latter should pay 75*l.* in cash to the creditor, and hand over to him a specified bill of exchange for 400*l.*, payable two months after January 18. The debtor also undertook to have transferred to the creditor 4000 fully paid-up shares in a specified company, with liberty to the debtor to repurchase the shares on or before January 28, 1903, at the amount of the judgment debt and taxed costs, with interest thereon. This was "to be security for the debt, but judgment still to be in full force." The 75*l.* was paid, and the bill of exchange was handed over to the creditor, and on January 29 an order setting aside the bankruptcy notice was made by consent. The defendant duly carried out his undertaking:—

Held, that, security for the debt to the satisfaction of the creditor having been given within seven days after service of the notice, the requirements of the notice had been complied with, and that, the debtor not having committed any default, the creditor was not entitled during the pendency of the security to serve the debtor with a fresh bankruptcy notice in respect of the same debt.

APPEAL from a receiving order made by one of the registrars in bankruptcy.

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(1) [1899] A. C. 143.

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On January 20, 1902, E. H. Durban recovered in the King's Bench Division a final judgment against J. Smith for 2129*l.* 6*s.* 3*d.* and costs. On January 22 Durban served Smith with a bankruptcy notice in respect of this judgment debt. On January 24 Smith was arrested under an order of the Court made under s. 25 of the Bankruptcy Act, 1883, on the ground that there was probable reason for believing that he was about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued. Proposals for a settlement were then made by Smith's solicitor on his behalf; and on January 28 an agreement was entered into between the parties, the material terms of which were as follows:—

"*Durban* v. *Smith.*

"The defendant is to be released from custody upon his paying to the plaintiff or his solicitors the sum of 75*l.* in cash, and handing over to the plaintiff or his solicitors" a specified bill of exchange for 400*l.*, payable two months after January 18, 1902, "and the defendant undertaking—(1.) To have transferred to the plaintiff 4000 fully paid-up shares of 1*l.* each in the Credit Bank, Limited, with liberty for the defendant to repurchase the said shares on or before January 28, 1903, at the amount of the judgment debt and taxed costs, with interest thereon at 4 per cent. per annum from January 20, 1902."

(2.) and (3.) The defendant was to assign to the plaintiff all his interest in the estates of two bankrupts whose names were stated.

"(4.) Upon payment to or receipt of money by the plaintiff from time to time, periodical rests to be taken of the balance of the said judgment debt, taxed costs, and interest as aforesaid.

"(5.) The above to be security for the judgment, but judgment still to be in full force."

As originally drafted, this agreement had contained an undertaking by the plaintiff "to stay all further proceedings herein on the above terms being carried out," but this clause was struck out by the plaintiff's solicitor.

The 75*l.* was paid, and the bill of exchange for 400*l.* was handed over to Durban, and on January 29 an order by consent

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SMITH, *In re.* DURBAN, *Ex parte.*

was made by the registrar for the release of Smith from custody and setting aside the bankruptcy notice.

The defendant duly carried out his undertaking contained in the agreement.

On July 11, 1902, Durban served Smith with a fresh bankruptcy notice for 1677*l.* 5*s.* 9*d.*, part of the judgment debt. Smith failed to comply with this notice within seven days after service, and upon the act of bankruptcy thus committed Durban on July 26 filed a bankruptcy petition against him, in which he alleged that Smith was indebted to him in the sum of 1677*l.* 5*s.* 9*d.*, being part of the amount due on the final judgment, and stating that he held security on the debtor's estate for the payment of part of the said sum, and that he estimated the value of the security at the sum of 100*l.*

Upon this petition the registrar on August 14, 1902, made the receiving order against which Smith now appealed.

Frank Mellor, for the appellant. The terms agreed upon between the judgment creditor and the debtor amounted to a "security" for the judgment debt "to the satisfaction of the creditor" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883 (1), and it is submitted that, there having been no default on the part of the debtor in carrying out the terms of the agreement, a second bankruptcy notice in respect of the same debt could not be properly issued during the pendency of the security. Consequently no act of bankruptcy was committed by the debtor, and a receiving order ought not to have been made.

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(1) By s. 4, sub-s. 1, of the Bankruptcy Act, 1883, "A debtor commits an act of bankruptcy in each of the following cases—(inter alia) (*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

Muir Mackenzie and *J. George Joseph*, for the creditor. The agreement (other than the payment in cash) was only a security for the judgment debt. It was not a part payment, and there was no suspension of proceedings under the judgment. The agreement placed the judgment creditor in the position of an ordinary secured creditor. Such a creditor has a personal remedy against the debtor which he can enforce if he pleases, though, no doubt, in a bankruptcy petition against the debtor he would have to give credit for the value of his security. But, notwithstanding his security, he is entitled to issue a bankruptcy notice against the debtor, in order to compel him to commit an act of bankruptcy. Here the agreement expressly provides that the judgment is "still to be in full force." If the appellant is right, it follows that if after service of a bankruptcy notice a security is given by the debtor for the judgment debt, and the security turns out to be of no value, still the creditor cannot issue another bankruptcy notice.

VAUGHAN WILLIAMS L.J. Construing the agreement in the creditor's favour in every respect, and assuming all the facts in his favour as found by the learned registrar, still, in my opinion, at the time when the creditor issued the second bankruptcy notice he had no right to issue it. [The Lord Justice read sub-s. 1 (*g*), and continued :—] It is admitted that security for the debt as there mentioned was given by the debtor to the satisfaction of the creditor after the service of the first bankruptcy notice, so that the debtor had within the express terms of sub-s. 1 (*g*) complied with the requirements of the notice, and it was impossible that he should commit an act of bankruptcy upon that notice. This is not in dispute. But it is said that, although the creditor had received this security to his satisfaction, he was at liberty the very next day to issue a fresh bankruptcy notice in respect of the same debt, and that this was the intention of the parties. It was said by counsel that in consideration of the debtor giving the security the creditor was to forbear to proceed. But in what way was he to forbear? He clearly could not proceed upon the bankruptcy notice, because the debtor had complied with its requirements, and I cannot agree that the intention of the parties was that the creditor should merely forbear to proceed with the bankruptcy notice. Looking at the terms of the agreement, I think it is clear that the intention of the parties was that no proceeding whatever should be taken by the creditor—not even the issue of a fresh bankruptcy notice—during the pendency of this security. [The Lord Justice referred to the terms of the agreement.] Under these circumstances it was, in my judgment, impossible for the creditor to issue a fresh bankruptcy notice, unless and until there had been some default made by the debtor in respect of the agreement, or until the expiration of the time thereby limited for the payment of the debt, namely, January 28, 1903. That, it seems to me, is the plain meaning of the agreement. But it is said that, by the final clause of the agreement, the judgment is "still to be in full force." But that only means that the judgment is not to be merged or extinguished—that is, in case the agreed security shall not within the agreed time realize enough to pay the debt, nothing contained in the agreement is to prevent the creditor from putting his judgment in force. Then it was said that, the clause in the draft agreement providing for the "stay of all further proceedings herein" having been struck out, the intention must have been that only the proceedings under the bankruptcy notice were to be stayed. I cannot agree with that argument. I am clearly of opinion that, having regard to the terms of the agreement, it was impossible for the creditor to issue the second bankruptcy notice when he did so. Consequently, no act of bankruptcy has been committed, and the receiving order must be rescinded.

STIRLING L.J. I am of the same opinion. The matter appears to me to turn entirely upon the true construction of the agreement. It is to be observed that the shares could not be sold before January 28, 1903, because until that day the debtor was to have an option to repurchase them. The fourth clause of the agreement is, in my opinion, sufficient to shew that the intention of the parties was that the property was to be realized by the creditor, and not to be taken by him

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in specie in satisfaction of the debt. There is, therefore, a security which cannot be realized until January 28, 1903. That, as it seems to me, was a complete compliance by the debtor with the requirements of the first bankruptcy notice. Is it then right—is it within the power of the creditor—to issue a fresh bankruptcy notice while the realization of the security is pending? It was never, I think, intended that the very next day after the security had been given, and without any change having occurred in the state of things, the creditor should be able to issue a fresh bankruptcy notice calling on the debtor (inter alia) to give a fresh security to his satisfaction. That, in my opinion, was never in the contemplation of the parties, and I think the creditor exceeded his rights when he issued the second bankruptcy notice. I therefore agree that the receiving order must be discharged.

COZENS-HARDY L.J. I agree.

Appeal allowed.

Muir Mackenzie asked for leave to appeal to the House of Lords.

THE COURT declined to give leave.

Solicitors: *Fuller & Farlow; Ernest Salaman, Fort & Co.*

W. L. C.

THE KING *v.* JUSTICES OF THE TEWKESBURY DIVISION OF GLOUCESTERSHIRE.

1902
Nov. 3.

Poor-rate—Appeal—Special Sessions—Notice of Appeal—Parish Council—Parochial Assessment Act, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 6—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 6, *sub-s.* 1, *and s.* 52, *sub-s.* 5.

Where, upon a poor-rate being made in a rural parish having a parish council, an appeal against the rate is brought to special sessions under s. 6 of the Parochial Assessment Act, 1836, it is now, since the passing of the Local Government Act, 1894, a condition precedent to the jurisdiction of the justices to hear the appeal that the appellant should have given notice of appeal to the parish council.

Rule for a mandamus to justices of the Tewkesbury Division of Gloucestershire to hold a special sessions and hear an appeal against the rating and assessment of the Swan Inn, in the parish of Leigh in the Tewkesbury Union.

On October 17, 1901, a poor-rate was made and published by the overseers of the parish of Leigh, wherein William Clifford was rated in respect of the Swan Inn on the basis of the valuation list then in force. The parish of Leigh is a rural parish having a parish council. Clifford gave notice of objection to the valuation list to the assessment committee of the union, but they declined to reduce the assessment. Clifford then caused notice of appeal to the special sessions against the rate to be served on the assessment committee and on the overseers of the parish. The appeal came on for hearing on June 12, 1902, when objection was taken on behalf of the assessment committee, who appeared as respondents, that the justices had no jurisdiction to hear the appeal, on the ground that it was a condition precedent to the hearing of the appeal that the parish council should have been served with notice of the appeal, which had not been done. The justices upheld the objection and dismissed the appeal. The appellant obtained a rule nisi for a mandamus as above mentioned.

C. F. Vachell, for the justices, shewed cause. Since the passing of the Local Government Act, 1894, it is a condition precedent to the hearing of an appeal at special sessions against a poor-rate made in a rural parish having a parish council that notice of the appeal should have been served by the appellant upon the parish council. Sect 6 of 6 & 7 Will. 4, c. 96, by which special sessions were first established for the hearing of appeals against rates on the ground of objections to the valuation, provided that "no such objection shall be inquired into by the said justices in special session unless notice of such objection in writing under the hand of the complainant shall have been given seven days at least before the day appointed for such special session to the collector, overseers, or other persons by whom such rate was made." By the Local Government Act, 1894, s. 6, sub-s. 1, "Upon the parish council of a rural parish coming into office there shall be transferred to that council (*c*) the powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of the parish with respect to—(i.) appeals or objections by them in respect of the valuation list, or appeals in respect of the poor-rate." No doubt in *Reg.* v. *De Grey* (1) it was held that where an order of the Local Government Board had been made under s. 33 of the Local Government Act, 1894, conferring on a borough council the "powers, duties, and liabilities of the overseers," the service of notice of appeal upon the borough council was not a condition precedent to the hearing of the appeal. But there the appeal was not to special sessions, but to quarter sessions, as to which s. 4 of 17 Geo. 2, c. 38, expressly provides that in the event of reasonable notice of appeal not having been given the justices "shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." If it is contended that the overseers had no "powers, duties, or liabilities" with respect to rating appeals to be transferred, the answer is that, if the assessment committee did not obtain leave from the guardians to appear as respondents on an appeal under s. 2 of the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), the rate would be undefended unless the overseers had the power of appearing, and the parish would suffer loss. The case of *Reg.* v. *Justices*

(1) [1900] 1 Q. B. 521.

of Kent (1) is an authority in favour of the respondent's contention.

Brooke Little, in support of the rule. The obligation of the appellant to give notice of appeal is not a "power, duty, or liability" of the person to whom the notice is to be given. Therefore the parish council are not substituted by s. 6 of the Act of 1894 for the overseers as the proper recipients of the notice. The overseers were never bound as matter of law to appear on the appeal and support the rate; therefore there was no liability of theirs in respect of the appeal to transfer. Sect. 6 of the Act of 1836 says that the notice is to be given to the "collector, overseers, or other persons by whom the rate is made." That shews that the notice was to be given to them not merely as overseers, but as being the persons who made the rate. If "parish council" is now to be read into s. 6 of the Act of 1836 in lieu of the word "overseers," the section will run—"collector, parish council, or other persons by whom the rate is made," which will involve an absurdity, for the parish council cannot make a rate; that has still to be done by the overseers. Sect. 52, sub-s. 5, of the Act of 1894 does not seem to carry the case any further. If the Legislature intended the parish council to be substituted for the overseers for this purpose, they have not used apt words to carry out their intention.

Further, the proviso in s. 6 of the Act of 1836 means merely that the justices shall not inquire into the objections to the rate then and there; it does not mean that they may not adjourn the appeal so as to allow of a proper notice being given. Indeed, it is contended that they are bound so to adjourn, for the provision as to adjournment in the Act of 17 Geo. 2, c. 38, ought to be read into the later Act. The Act of 1836, unlike that of Geo. 2, does not say that the appeal shall be to the "next" session. But it has been held in *Reg.* v. *Trafford* (2) that for this purpose the Act of 1836 must be read with the Act of Geo. 2, and the appeal to special sessions must, like the appeal to quarter sessions, be to the next practicable session. But if by judicial interpretation the provision as to the particular session is to be imported from one Act into the other, the provision as to adjournment ought equally to be imported.

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(1) (1899) 80 L. T. 622.

(2) (1850) 15 Q. B. 200.

LORD ALVERSTONE C.J. In this case a rule was moved for a mandamus to justices to hold a special session and hear a rating appeal. The question was whether it was a condition precedent to the justices' jurisdiction to hear the appeal that notice of appeal should have been served upon the parish council. In support of the rule two points were contended for. On the one hand it was urged that the justices in special sessions were not deprived of jurisdiction by the omission of the appellant to serve the notice of appeal required by s. 6 of the Act of 1836, but were bound to adjourn the appeal to the next special session with a view to its being then heard, because the provision in the Act of Geo. 2 as to adjournment ought to be read into the Act of 1836. I have always understood that the Act of 1836 was intended to give a special remedy with special limitations. The language of the proviso to s. 6 of that Act is imperative, and it is too late now to suggest that that proviso is inoperative because of the more liberal right of appeal given under the Act of Geo. 2. Further, it was contended that even if notice of appeal must, before the Local Government Act, 1894, have been given to the overseers, it need not now be given to the parish council. That depends upon whether the right of the overseers to have notice of appeal comes within the words "powers, duties, and liabilities of the overseers . . . . with respect to . . . . appeals in respect of the poor-rate," which are now transferred by s. 6 of the Local Government Act to the parish council. It is difficult to see what can be included under those words if it is not the duty of the overseers to see that the correctness of their valuation upon which the poor-rate is based is maintained. I think that it was intended by that section that the parish council should have a voice in determining whether the appeal should be resisted. Further, s. 52, sub-s. 5, provides in the most general terms that "All enactments in any Act . . . . relating to any powers, duties, or liabilities transferred by this Act to a parish council . . . .

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from justices or the vestry or overseers or churchwardens and overseers shall . . . . be construed as if any reference therein to justices or to the vestry or to the overseers, or to the churchwardens and overseers, referred to the parish council." It seems to me that the generality of the language there used shews that it was intended that the provisions of s. 6 should apply to all cases in which the parish council are interested in the matters therein referred to. I think that notice of appeal should have been given to the parish council, and the rule must consequently be discharged.

Wills J. I am of the same opinion.

Channell J. I agree.

Rule discharged.

Solicitors for prosecutor: *Peacock & Goddard, for A. Lamb, Cheltenham.*

Solicitors for justices: *Badham & Comins, for Brookes & Badham, Tewkesbury.*

J. F. C.

1902
Nov. 3.

HUMPHERY *v.* YOUNG.

Local Government—"Drain"—Semi-detached Houses—"One Building only"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 4.

By s. 4 of the Public Health Act, 1875, "'Drain' means any drain of and used for the drainage of one building only." No general rule can be laid down as to whether a pair of semi-detached houses are "one building only" within the meaning of the above section or not, even though they be under one continuous roof. It is in each case a question of fact.

CASE stated by justices for the borough of Reigate.

An application in writing having been made under s. 41 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to the local authority of the borough of Reigate, stating that a drain belonging to premises situate and being Nos. 36 and 38, Somers Road, within the said borough, was a nuisance and injurious to health, the local authority empowered the appellant, the inspector of nuisances for the borough, to enter the premises and examine the drain. Upon examination the drain appeared to be in a bad condition and to require alteration or amendment; and thereupon the local authority sent to the respondent, who is the owner of the premises, a notice requiring him to do the necessary works. The respondent did not comply with the notice, and the appellant accordingly preferred an information against the respondent under the above-mentioned section.

The premises in question are a pair of semi-detached houses, built apparently at the same time, having one continuous roof, and divided by a party-wall which does not go up through the roof. At the time of the erection of the houses the local authority did not require the party-wall to be carried up above the roof. At the point of division there is a recess in the front wall down which a water-pipe runs. The houses have gardens in front and behind, which are divided by fences. The houses have always been the subject of separate lettings, and occupied by separate tenants. The houses are separately assessed and rated in the poor and other rates. The drain or sewer in question is used for the drainage of both houses. It commences at the point of junction of two separate drains which drain the respective houses, runs thence under the garden of one of the houses into and under a public road called Somers Road, and is connected with a public sewer which runs along that road.

On the part of the appellant it was contended that the two houses are "one building only" within the meaning of s. 4 of the Public Health Act, 1875 (1), whereby the expression "drain" as used in that Act is defined, and that consequently the drain or sewer in question is a drain within the meaning of s. 41.

On the part of the respondent it was contended that the two houses are two buildings not within the same curtilage, and that the sewer or drain is not a drain within the meaning of the said section, but a sewer vested in and repairable by the local authority.

The justices found as a fact (if and so far as it is a question of fact) that the two houses are two separate buildings and not within the same curtilage, and were of opinion, on the authority of *Travis* v. *Uttley* (2), that the drain or sewer in question is a sewer within the meaning of the Public Health Act, 1875, vested in the local authority, and that the respondent could not be required to alter or amend it. They therefore dismissed the information subject to a case for the opinion of the High Court.

Bray, K.C., and *G. Humphreys*, for the appellant. The case of *Hedley* v. *Webb* (3) is in the appellant's favour. There Cozens-Hardy J. drew a distinction between a building and a house, and held that a pair of semi-detached houses, though they might be distinct houses, were "one building only" within the meaning of s. 4, and that the pipe which received the drainage of the two houses was a drain and not a sewer.

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(1) By s. 4 of the Public Health Act, 1875, "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed."

(2) [1894] 1 Q. B. 233.

(3) [1901] 2 Ch. 126.

That case is later than *Travis* v. *Uttley* (1), and is to be preferred.

Macmorran, K.C., and *Naldrett*, for the respondent. Whether a pair of semi-detached houses is one building or two is a question of fact in each case. In *Hedley* v. *Webb* (2) the judge expressly said that he decided the point only as a question of fact. Therefore that case is an authority against the appellant, for here the magistrates have found the fact against him.

Bray, K.C., in reply. The existence of an ordinary pair of semi-detached houses with a continuous front wall and a continuous roof is so common a condition of things that the Court is invited to lay it down as a proposition of law whether such houses are to be regarded as one building or not. It would be highly inconvenient if different tribunals were to be at liberty to take opposite views upon precisely similar facts.

LORD ALVERSTONE C.J. We are invited to lay down a general rule as to whether a pair of semi-detached houses is to be regarded as one building or more. I am of opinion that we cannot do so. It is in every case a question of fact. Here the two houses are stated to have gardens in front and behind separated by fences, and to have been always occupied by separate tenants. Upon that evidence the justices found as a fact that the two houses were separate buildings not within the same curtilage. It is impossible to say that there was not evidence upon which they could so find. In *Hedley* v. *Webb* (2) Cozens-Hardy J. held that the pair of semi-detached houses with which he had there to deal were one building, but he treated the question as purely one of fact. Therefore that case, so far from being an authority in favour of the appellant's contention, is an authority the other way.

WILLS J. I am of the same opinion. In cases of this kind the facts are seldom precisely the same, and the question of one building or two must consequently be treated as one of fact.

(1) [1894] 1 Q. B. 233.

(2) [1901] 2 Ch. 126.

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CHANNELL J. I agree that it is a question of fact. It would no doubt be very useful to lay down a general rule to govern decisions upon a state of facts very constantly arising, but we have no power to do so.

Appeal dismissed.

Solicitors for appellant: *Nicol, Son & Jones, for C. J. Grece, Redhill.*

Solicitors for respondent: *Pettiver & Pearkes.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 4.

STUART *v.* FREEMAN.

Insurance, Life—Yearly Insurance—Quarterly Payments of Premium—Days of Grace—Payment of Premium after Death of Assured—Payment within Days of Grace.

The plaintiff was assignee of a policy of insurance on the life of another person. The policy was for a year, and the premium was payable quarterly, the first quarterly payment being made at the date of the policy. One of the conditions of the policy was that it should be of no effect if, at the time of the death of the assured, any quarterly premium should be more than thirty days in arrear. The assured died during the year after one of the dates fixed for payment of a quarterly premium, but within the days of grace, and the premium was paid after his death by the plaintiff, but also within the days of grace. In an action to recover the amount insured:—

Held, that the policy being for a year, subject to defeasance on non-payment of any quarterly premium, no question arose as to the revival of the policy by payment during the days of grace, but that the policy was prevented from lapsing by such a payment, and that the plaintiff was entitled to recover.

Pritchard v. *Merchants' Life Assurance Society*, (1858) 3 C. B. (N.S.) 622, distinguished.

APPLICATION for a new trial or that judgment should be entered for the plaintiff in an action tried by Ridley J. with a jury.

The action was brought to recover the amount insured under a policy upon the life of F. C. Lawley, granted by the General Life Assurance Company, of which the defendant was manager. The policy was dated November 18, 1899, and the sum assured

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was stated at the head of the policy to be 2500*l*. Then followed a provision as to the premium: "Premium. If paid annually, 404*l*. 11*s*. 8*d*. on every 18th day of November. If paid half-yearly, 207*l*. 7*s*. 11*d*. on every 18th day of November and 18th day of May. If paid quarterly, 105*l*. on every 18th day of November, 18th day of February, 18th day of May, and 18th day of August." The policy witnessed that, in consideration of the assured having paid to the company the sum of 105*l*. on account of the premium for one year terminating on November 17, 1900, for an assurance of the sum of 2500*l*. upon the life of the assured, the company agreed that "in case the assured shall die before or upon that day, or shall survive that day, and there shall be paid to the company a like premium before, upon or within thirty days after the day above mentioned, and in every succeeding year during which the assured shall be living, the capital, stocks and funds of the company shall, according and subject to the provisions of the deed of settlement of the company and the conditions indorsed hereon, be liable to pay to the assured, his executors, administrators, or assigns, after proof satisfactory to the directors of the company of the age and death of the assured, the sum of 2500*l*." Among the conditions indorsed on the policy were the following: "(1.) The assured has the option of paying the premiums half-yearly or quarterly instead of annually, in which case such half-yearly or quarterly premium, as the case may be, shall be the amount and payable on the days hereinbefore respectively mentioned. Provided nevertheless that in case a claim shall arise at any time during the subsistence of this policy, and before all the premiums, whether half-yearly or quarterly, for the then current year, commencing at a date corresponding with the commencement of this policy, shall have become due and been paid, that then and in such case the amount of such half-yearly or quarterly premium so not having become due and been paid shall be deducted from the sum assured by this policy, and the remainder of such last-mentioned sum shall be alone payable to the assured, his executors, administrators, or assigns. Provided also that this policy shall, subject to the condition next hereunder appearing, be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted any of the above-mentioned premiums, as well half-yearly or quarterly as annual, shall be more than thirty days in arrear."

The second condition related to the terms on which the policy might be revived in the event of a lapse by non-payment of any premium within thirty days of its becoming due.

The plaintiff was assignee of the policy, and on August 18, 1901, a quarter's premium became due. The thirty days' grace expired on September 17, 1901, without the premium having been paid, but on the following day, September 18, it was paid to a clerk of the company by the plaintiff, who received a receipt for it. The assured died on that same day, a few hours before the premium was paid and accepted, but the fact of his death was not known to either party to that transaction. On learning the facts the company refused to pay the money insured, upon the ground that at the time of the death of the assured the policy had become void by reason of the premium being in arrear, and that the policy could not be revived by payment after the death of the person insured. At the trial there was evidence of an arrangement by which, if the assured did not pay the quarterly premiums within the thirty days allowed after the fixed days for payment, the plaintiff, who was an insurance broker, was to be entitled to make the payment on the next day. The jury found that this course had been assented to by the company's clerk, and that he had authority to make the arrangement. The effect of this arrangement would be to add a day to the thirty days of grace; but the learned judge, upon the authority of *Pritchard* v. *Merchants' Life Assurance Society* (1), held that the payment of the premium after the death of the assured, though made within the agreed days of grace, was not binding upon the company, and he accordingly entered judgment for the defendant.

The plaintiff appealed.

J. E. Bankes, K.C., and *A. Powell, K.C.*, for the plaintiff. There was conflicting evidence as to the agreement to add a

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(1) 3 C. B. (N.S.) 622.

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day to the thirty days' grace; but the jury believed the evidence for the plaintiff, and it is impossible to say that there was no evidence to go to the jury on this point. In *Pritchard* v. *Merchants' Life Assurance Society* (1) the payment of the premium was after the expiration of the days of grace, and the opinions expressed as to the effect of payment within those days, but after the death of the assured, were dicta and not decisions. In the present case, the premium being taken to have been paid within the days of grace, by the terms of the policy there was no lapse, although the assured died during the days of grace, and before payment of the premium. The policy on payment of the first quarterly instalment came into force for a year, but was liable to lapse unless kept on foot by the subsequent quarterly payments within the agreed time. The same policy would run for the whole year, and during that period there would be no question of renewal—the only question that could be raised being whether the policy had lapsed. That creates a further distinction between this case and *Pritchard* v. *Merchants' Life Assurance Society.* (1)

Duke, K.C. (with him *Ellis Hill* and *A. W. Wills*), for the defendant. There was no evidence that the company's clerk had any authority to bind the company by receiving the premium after the days of grace. Further, assuming payment within the days of grace, when that payment was made the policy had lapsed by the death of the assured. There was a fixed time for payment, and the days of grace had reference to an insurance in the future, and such an insurance could only be made on a life in existence. This view is supported by the decision in *Simpson* v. *Accidental Death Insurance Co.* (2) as well as by the judgments in *Pritchard* v. *Merchants' Life Assurance Society.* (1)

A. Powell, K.C., in reply.

Collins M.R. This is an appeal from the judgment for the defendant entered by Ridley J. at the trial of the cause with a jury. The action was brought on a life policy by the terms of which the premium was payable quarterly on certain fixed dates, or within thirty days after each of these dates. The premium payable at one of these dates was in fact paid on the thirty-first day after it was due, and it happened that the assured had died on that day, and before the quarter's premium was paid. The question that arose was whether the payment of the premium one day after the thirty days allowed was equivalent to a payment within the days of grace, and a further question was whether, if the premium could be treated as a payment within the terms of the policy, it was an adequate payment so as to give the plaintiff as assignee of the policy a right to recover on it, though the payment was made after the death of the assured. The first point to which I have referred was a question of fact for the jury. [The Master of the Rolls examined the evidence on this point, and continued :—]

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(1) 3 C. B. (N.S.) 622.

(2) (1857) 2 C. B. (N.S.) 257.

The question is whether on these facts there was evidence fit to be submitted to the jury that the premium was received under the authority of the defendant, so that the receipt was binding on the company. The conclusion I have come to is that there was abundant evidence to go to the jury, and that their finding on this matter cannot be impeached.

That conclusion puts the payment on the thirty-first day after the named day for the quarterly payment on the same footing as if it had been made within the thirty days mentioned in the policy; and the further question then arises whether it was a good payment in point of law, being made within the days of grace but after the death of the assured. The learned judge held, on the authority of *Pritchard* v. *Merchants' Life Assurance Society* (1), that the plaintiff could not recover on the policy. The judgments of the learned judges, so far as they relate to the matter we have to consider, were not decisions, but were a series of dicta, which are, without doubt, of great weight. It should be noted that in the case cited the premium was an annual payment, and, further, that the premium was paid after the days of grace allowed for that annual payment. Sir James Shaw Willes gives his view on the question before us in these words (2): "The inclination of my opinion—if it be necessary

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(1) 3 C. B. (N.S.) 622.

(2) 3 C. B. (N.S.) 622, at p. 643.

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to express one, and perhaps it is, for it has an important bearing on the case—is, that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years provided the future premiums are paid within thirty days after the expiration of each period of insurance." That which the learned judge was dealing with was an annual insurance at an annual premium, with a provision for renewal which would entitle the assured to insure in a future year at the same premium and not at a higher one, provided he approached the insurers within a certain time. It is advantageous to have this right of renewal at the original premium, but such a right as that does not get rid of the fundamental principle that the person on whose life the matter turns must be alive, and that, if he is dead and cannot come within the given time to ask for a future insurance, no one else can do so. In the present case, within the course of the year for which the insurance was to run, some instalments were paid. The provision as to payment by instalments does not affect the fact that the insurance was for a year, but attaches a condition of defeasance if any instalment is not paid within the days of grace. In the one case that which is agreed on is a right to renew on certain terms; in the case before us there is a subsisting insurance which, if not forfeited, endures for a year. At the head of the policy we find—"Premium. If paid quarterly, 105*l.*," and payment is to be made on certain fixed days. Then the policy witnesses that, the assured having paid 105*l.* on account of the premium for one year, the company agree that in case the assured should die before the last day of the year, or "shall survive that day, and there shall be paid to the company a like premium before, upon, or within thirty days after the day above mentioned, and in every succeeding year during which the assured shall be living," the funds of the company, subject to the deed of settlement of the company, and the conditions indorsed on the policy, should be liable to pay the amount assured. These provisions, read with that as to 105*l.* being the amount to be paid quarterly, create an insurance for a year at a premium for the year payable quarterly. The conditions indorsed on the policy give in explicit terms the option to pay the premiums quarterly instead of annually; and that the premium is a yearly one is shewn by the second clause of the first condition, which provides for the deduction from the amount payable, in case of a claim on the policy, of the half-yearly or quarterly premiums for the current year, which may not have become due and been paid when the claim—that is, the claim on the death of the assured—arises. The condition continues in these terms: "Provided also that this policy shall, subject to the condition next hereunder appearing"—a condition that relates to the revival of a lapsed policy—"be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted any of the above-mentioned premiums, as well half-yearly or quarterly as annual, shall be more than thirty days in arrear." The scheme of the policy is that it shall be for a year, and shall be kept alive till default, and shall not be forfeited if the premiums are paid quarterly within the days of grace. In point of principle it follows that it is not necessary to shew the existence of the life assured when the premium is paid within the agreed time.

I think, therefore, that the finding of the jury cannot be disturbed, and, if it is accepted, then in point of law it establishes that the payment was made within the time indicated on the policy.

It follows that, in my opinion, this appeal must be allowed, and judgment must be entered for the plaintiff.

ROMER L.J. As to the question of fact which was left to the jury, I need only say that, looking at all the circumstances of the case, we ought not to hold that there was no sufficient evidence to justify the jury in coming to the conclusion at which they arrived. That being so, we must treat the payment of the premium on September 18 as if it had been made within the thirty days of grace, or treat the death as if it had occurred within those thirty days, and before the payment of the premium. I prefer to decide the question that arises under this state of facts on the wording of the policy, though I by no

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means say that the reasons for my decision might not affect other policies not so clearly expressed.

In my opinion, the payment of the premium was made in accordance with the terms of this policy, and I see no reason why an artificial interpretation should be put on those words. It is to be noted, having regard to some of the observations made in the judgments in *Pritchard* v. *Merchants' Life Assurance Society* (1), that in this policy it is not provided that the premiums shall be paid by the assured, without any mention of executors or assigns, although I do not wish it to be supposed that I think had it been so it would have been fatal to this claim.

The precise question raised by the defendant is settled by the first condition indorsed on the policy. The last clause of that condition shews under what circumstances the policy becomes void in the case of quarterly payments of the premium. It runs thus: "This policy shall be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted any of the above-mentioned premiums, as well half-yearly or quarterly as annual, shall be more than thirty days in arrear." Presumably, therefore, the policy is to be valid and continuing even though the person whose life is assured dies within the thirty days, and the premium has not been paid before his death. The earlier part of the condition is in accord with this view. It provides that "in case a claim shall arise at any time during the subsistence of this policy, and before all the premiums, whether half-yearly or quarterly, for the then current year, commencing at a date corresponding with the commencement of this policy, shall have become due and been paid," those amounts are to be deducted from the sum payable under the policy. I have pointed out that this policy was subsisting during the thirty days, and that death occurred during those thirty days, so that a claim arose; and in this condition I find an express provision by which the premium that had to be paid within those thirty days is to be deducted from the amount payable under the policy, and the balance only is to be paid over.

(1) 3 C. B. (N.S.) 622.

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I think this case comes within the terms of the policy, and I agree that the appeal should be allowed.

MATHEW L.J. I am of the same opinion. On the question of the agreement set up by the plaintiff, I think that there was evidence for the jury. They were the proper authority to determine that matter, and their finding ought not to be disturbed. The point of law raised is based on the two cases of *Simpson* v. *Accidental Death Insurance Co.* (1) and *Pritchard* v. *Merchants' Life Assurance Society.* (2) The observations of the learned judges in those cases must be treated with respect; but I find myself unable to agree with the dicta in the second case, that allowing days of grace means only that during those days there was to be a continuing offer to renew the policy, and that unless that offer was accepted and payment made while the life insured was in existence the policy was void. That appears to be the view glanced at rather than decided. However that may be, I do not think that view is applicable to the present case. There was here a policy for a year, and it is difficult to see why the giving of days of grace should be treated as an offer to renew a policy that had not run out its full term. In my opinion, the correct view as to the days of grace allowed by the terms of this policy is—that if payment is made within the time mentioned it is to be taken to have been made on the day appointed for payment, and is to have the same effect as if it had been made on that day. I agree that there should be judgment for the plaintiff.

Appeal allowed.

Solicitors for plaintiff: *George S. Warmington & Co.*
Solicitors for defendant: *Gush, Phillips, Walters & Williams.*

(1) 2 C. B. (N.S.) 257.

(2) 3 C. B. (N.S.) 622.

A. M.

1902
Oct. 29.

SMITH, APPELLANT *v.* MOODY, RESPONDENT.

Criminal Law—Conviction insufficiently describing Offence—Conspiracy and Protection of Property Act, 1875 (38 *&* 39 *Vict. c.* 86), *s.* 7—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 39, *sub-s.* 1.

By s. 7 of the Conspiracy and Protection of Property Act, 1875, a person commits an offence who, "with a view to compel any other person to abstain from doing . . . . any act which such other person has a legal right to do . . . . wrongfully and without legal authority . . . . (1.) injures his property."

The appellant was convicted under this section, the conviction stating that the appellant, on February 4, 1902, "with a view to compel" the respondent "to abstain from working for Messrs. J. B. & Partners, Limited, at F. Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property" of the respondent:—

Held, that the act, which the appellant sought to compel the respondent to abstain from doing, was sufficiently specified in the conviction; but that the conviction was bad on its face, and must be quashed, in that it did not specify what property of the respondent had been injured.

Reg. v. *McKenzie,* [1892] 2 Q. B. 519, and *Ex parte Wilkins,* (1895) 64 L. J. (M.C.) 221, discussed.

The Summary Jurisdiction Act, 1879, s. 39, sub-s. 1, which provides that in proceedings before Courts of summary jurisdiction "the description of any offence in the words of the Act . . . . creating the offence, or in similar words, shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question.

CASE stated by the Court of general quarter sessions of the peace for the county of Durham.

At a Court of summary jurisdiction in the county of Durham the appellant was convicted for an offence alleged to have been committed by him under s. 7 of the Conspiracy and Protection of Property Act, 1875. (1)

The conviction, so far as material, was in the following terms: "The defendant is this day convicted for that he on the 4th day of February, 1902, at the parish of Heworth, in the said county, with a view to compel Thomas William Moody to abstain from working for Messrs. John Bowes & Partners, Limited, at Felling Colliery, in the said county, which he had a legal right to do, unlawfully, wrongfully, and without legal authority did injure the property of the said Thomas William Moody contrary to the statute in such case made and provided."

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(1) By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7, "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—(1.) . . . . injures his property . . . . shall, on conviction thereof by a Court of summary jurisdiction, ... be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

The appellant appealed from the conviction to quarter sessions. Upon the case being called on, and prior to any hearing thereof on its merits, counsel for the appellant submitted that the conviction was bad on its face, and ought for that reason to be quashed, upon two grounds: (*a*) that the conviction contained no sufficiently definite specification of any act which the respondent had a legal right to do, or of any act which the appellant intended to compel the respondent to abstain from doing; (*b*) that the property of the respondent alleged to have been injured by the appellant ought to have been particularly specified in the conviction.

Both objections were overruled, and after hearing the case on the merits the conviction was affirmed.

The question for the Court was whether the conviction was bad on either ground, or whether the same was a good and valid conviction.

Simey, for the appellant. The conviction is bad on both of the grounds stated in the case. It is not sufficient to say that the appellant, with a view to compel the respondent "to abstain from working" for a particular firm, did, &c. That is too vague. Working for an employer would include a variety of acts, and the particular act ought to have been set out in the conviction. On this point *Reg.* v. *McKenzie* (1) is decisive in the appellant's favour. Secondly, the conviction is bad in that it does not state what property of the respondent was injured. It will be contended that as the conviction follows the words of s. 7 of the Act of 1875, which creates the offence, that is

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by reason of s. 39 of the Summary Jurisdiction Act, 1879, a sufficient description of the offence; but s. 39 made no change in the law in this respect: it only enacted what has been the law for at least two hundred years: see *Rex* v. *Chandler* (1), per Holt C.J.; and the section does not do away with the rule that in a conviction, as in an indictment, all the facts and circumstances constituting the offence must be specially set out. It could not be contended that an indictment for larceny or for malicious injury to property would be good if the property stolen or injured were not described; so here the injury to the property is an essential ingredient of the offence, and a description of it ought therefore to have been set out in the conviction.

Shortt, for the respondent. The conviction sufficiently specifies the nature of the act. It is not necessary, and in many cases it would be impossible, to state the precise nature of the work which the workman is prevented from doing. *Reg.* v. *McKenzie* (2) is no authority for saying that a conviction in this form is bad, for there the conviction gave no information at all, neither did it follow the words of the statute. It is also inconsistent with the later case of *Ex parte Wilkins.* (3) The second objection is also groundless. The offence is described in the words of s. 7 of the Act of 1875, and that is by s. 39 of the Summary Jurisdiction Act, 1879, made a sufficient description. In *Reg.* v. *McKenzie* (2) Bruce J. thought that if the conviction in that case had followed the language of the Act creating the offence, it would have been good. Further, apart from s. 39, the language of this conviction fully complies with all the requirements of the rule as to specially setting out all the facts constituting the offence. The gist of the offence here is not the injury to the property, but the intent with which the act was done, and it is therefore unnecessary to state what property was injured: *Ex parte Perham.* (4)

Simey, replied.

LORD ALVERSTONE C.J. In this case two objections are taken to the form of the conviction. The first is that the

(1) (1700) 1 Ld. Raym. 581.

(2) [1892] 2 Q. B. 519.

(3) 64 L. J. (M.C.) 221.

(4) (1859) 29 L. J. (M.C.) 33.

conviction does not sufficiently state the act from the performance of which the respondent was induced to abstain. It is contended that the conviction should have stated the work which the respondent was going to do, or the nature of the act which he was going to do, so to speak, in the furtherance of working for the firm named. I am of opinion that this objection fails. As regards this point no material fact has been omitted from the conviction, and the offence is sufficiently stated. It is clear that the Act would apply to the case of a man who, not having in fact been employed by the employer named, is intending to try and obtain work from him at a particular place, and who therefore may not know the precise nature of the work which he will have to do; but it would be impossible in such a case to set out in the conviction the exact nature of the act which the workman was compelled to abstain from performing. It is said on behalf of the appellant that this view is contrary to that expressed by the present Master of the Rolls, then Collins J., in *Reg.* v. *McKenzie* (1); but I am of opinion that there is nothing in *Reg.* v. *McKenzie* (1) contrary to the view which I am now expressing. The conviction there merely stated that, with a view to compel the informant from doing acts which he had a legal right to do, the defendant followed the informant in a disorderly manner. No information whatever was given; neither the name of the employer nor the place of employment was mentioned; and the conviction did not even allege that the man wanted to work at all. The Court held that the conviction was bad, because it ought to have set out some particular and definite act which the defendant had intended to compel the informant to abstain from doing; but there is nothing in the judgments to shew that my brothers Collins and Bruce thought that a statement that an endeavour had been made to compel a man from working for a particular employer at a specified place would have been insufficient. A similar question came before Cave and Lawrance JJ. in *Ex parte Wilkins* (2), and the conviction in the present case is quite as specific for the purpose of stating the offence as it was in that case; and Cave J.

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in referring to *Reg.* v. *McKenzie* (1) made use of observations which shew that he, at any rate, declined to accept the broad principle which has been contended for in this case on behalf of the appellant. For these reasons I think that this objection fails.

The second objection to the conviction is that it does not sufficiently specify the property of the respondent which the appellant is alleged to have injured, the only words used being "did injure the property of" the respondent. I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by s. 39 of the Summary Jurisdiction Act, 1879, which provides that "the description of any offence in the words of the Act . . . . creating the offence, or in similar words, shall be sufficient in law"; but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by s. 39 is that the offence itself need only be described in the words of the statute creating it. As was put in the argument for the appellant, it clearly would not be sufficient to say, in a conviction for larceny, "did steal the property of" the prosecutor, without any further particulars; and, in my opinion, s. 39 does not cure the omission from a conviction of such particularity in the description and details of the offence as has always been required. I therefore come to the conclusion on this part of the case that the conviction insufficiently described the offence, and that it is no answer to the objection to say that in using the words "did injure the property of" the respondent the language of s. 7 of the Act of 1875 has been followed, and therefore that no more information is required. I have come to this conclusion with some reluctance, because I have very little doubt that actual injury to the respondent's property was proved; but in giving our decision we have to consider how far it may have a bearing on

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other proceedings. The second objection is, in my opinion, fatal, and the conviction must therefore be quashed.

WILLS J. I am of the same opinion, and I subscribe to everything that has fallen from my Lord with regard to both branches of this discussion.

I think that s. 39 of the Summary Jurisdiction Act, 1879, which provides that it is sufficient to describe the offence in the words of the statute creating the offence, cannot be supposed to have been intended to break down the very important rule which has prevailed now for at least two hundred years in the administration of justice with respect to the sufficiency of particulars in a conviction. I do not think for a moment that it was intended to relieve persons who had to draw convictions from inserting anything that was necessary as an ingredient of the offence of which the particular defendant has been found guilty. When one comes to the description of the offence itself, then it is quite sufficient if it is described in the terms of the statute, however general they may be. At the same time the old rule must prevail, that whatever is necessary to shew that the person convicted has done something which brought him within the words of the statute must still be specified.

With regard to the first question I feel no difficulty, because that which the appellant intended to prevent the respondent from doing, namely, working for an employer, is necessarily of a somewhat vague character. It may be that the object of the appellant was to prevent the respondent from doing any work at all, and in such a case it would be impossible to state any specific act which the appellant sought to compel the respondent to abstain from doing. The act is described in the conviction as "working for Messrs. John Bowes and Partners, Limited, at Felling Colliery, in the said county," and I do not know how a more specific or appropriate description than that could be given. If it were necessary to choose between the two decisions, *Ex parte Wilkins* (1) and *Reg.* v. *McKenzie* (2), I should certainly be disposed to say that I agree with the former rather than with the latter; but, for the reasons which my Lord has given, I do not think that there is any real inconsistency between the two decisions, though, no doubt, some of the observations of Collins J. in *Reg.* v. *McKenzie* (1), when divorced from the particular circumstances to which they refer, do appear to go further than the case then before the learned judge, and to apply to such a case as the present; nor do I think that Cave J. in *Ex parte Wilkins* (2) meant to depart from a case which was binding on him.

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(1) 64 L. J. (M.C.) 221.

(2) [1892] 2 Q. B. 519.

But when we come to the second branch of this case it does appear to me that there is a very important question involved. I can well understand the reason of the necessity for holding magistrates and other tribunals to strictness in this matter of describing the elements in an offence, because, if laxity is allowed in the statement of the offence in the summons or in the conviction, it is a great encouragement to those who have to deal with such matters to take refuge in generalities, and not to apply their minds to the specific question. Here the appellant has committed a specific offence; but it does seem to me that merely saying that he "wrongfully injured the property" of the respondent, without anything further, is not sufficient. It is not that there is any insufficiency in the description of the offence itself: the description of the offence follows the words of the statute; but there is insufficiency with respect to the ingredients of the offence which the appellant has committed, and for which he has been convicted. I think specific information as to the injury to property ought to have been given in the conviction.

CHANNELL J. I agree. I have a very clear opinion on the first point. In all probability the actual thing that was proved was that there was a desire to compel the respondent to abstain from doing any work of any kind whatever for the particular firm at the particular place; and if that was proved, that is clearly an offence within the meaning of this statute, and it would be impossible to state it otherwise than in the way in which it is stated. I do not suppose that the intention was to prevent the respondent from working in one particular capacity, and to allow him to work in another; at any rate, if that which I have suggested was proved, the offence was committed, and

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(2) 64 L. J. (M.C.) 221.

the conviction as stated is not in any way defective. It is unnecessary to go through the cases in detail, as my learned brothers have referred to them; but there is nothing in the cases which is contrary to that.

On the second point, I confess I have a good deal of doubt. I do not myself see the mischief that my brother Wills seems to think there is with regard to the form of the conviction, because the form is necessarily drawn up after the conviction, and it does not seem to me that our holding that the conviction might be recorded in general terms would induce magistrates not to be particular as to what was proved. The principle, however, seems to be that, subject to statutory provisions making certain things unnecessary in certain cases, the conviction must be as precise as the summons, and if there were a charge against a man—either by an indictment or by summons, made in the vague way in which this conviction is drawn up—a charge against a man of injuring the property of another, without specifying what property or giving any further information, it does seem to me that that would be insufficient. Therefore, following the rule that the conviction must be as precise as an indictment, I think that this conviction is wrong in form unless it is met by some statutory provision on the point. Sect. 39 of the Summary Jurisdiction Act, 1879, is the one relied on; but that seems to be rather a repetition of previous enactments, and, although s. 39 provides that it shall be sufficient so far as regards the description of the offence to follow the statute, I do not think the section in any way dispenses with the usual necessity for specifying time and place and matter in the way in which it has been hitherto specified. It could not possibly suffice in a case of larceny simply to specify the name of the person whose property was stolen. There must be facts relating to the particular matter, such as the time when and the manner in which the offence was committed, which would have to be inserted in the charge, and the omission of which cannot be cured by stating the offence in the words of the statute. No doubt the conviction might have been amended at quarter sessions, assuming, of course, that some specific property of the respondent was in fact

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proved to have been injured, and, therefore, I am rather reluctant to give effect to the objection; but we have no materials on which to make an amendment, and there is, therefore, nothing for us to do but to quash the conviction.

Appeal allowed. Conviction quashed.

Solicitors for appellants: *Pyke & Parrott, for Joel & Parsons, Newcastle-upon-Tyne.*

Solicitors for respondents: *Robinson & Bradley, for Edward Clark, Newcastle-upon-Tyne.*

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[IN THE COURT OF APPEAL.]

MOREL BROTHERS & CO., LIMITED *v.* EARL OF WESTMORELAND AND WIFE.

Husband and Wife—Authority of Wife to pledge Husband's Credit—Goods supplied on Order of Wife—Joint Liability—Presumption arising from Cohabitation—Principal and Agent—Alternative Liability—Election—Judgment signed against one of two Defendants—Order XIV., *r.* 5.

The facts that a husband and his wife, each having property, have been living together, and that necessaries have been supplied for the household on the orders of the wife, afford no evidence of a joint liability on the part of the husband and wife to pay for the necessaries so supplied. The presumption primâ facie arises in such a case of an actual authority impliedly given to the wife by the husband to pledge his credit for necessaries for the household, but that presumption may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit.

Where a claim was made in an action for the price of goods against a husband or his wife alternatively, and the plaintiffs under Order XIV. obtained leave to sign, and signed judgment for the amount claimed against the wife, who had separate property:—

Held, that the signing of judgment against the wife was a conclusive election by the plaintiffs to rely on her liability, and they could not afterwards insist on the liability of the husband.

Rule 5 of Order XIV. does not apply where the right of action can only be in the alternative against one or other of two defendants.

APPLICATION for judgment or a new trial in an action tried before Phillimore J. with a jury.

The action was brought against the Earl and Countess of Westmoreland to recover the price of wines and provisions supplied by the plaintiffs between May, 1897, and September, 1901.

Judgment for the amount claimed had been signed under Order XIV. against the Countess, who did not defend the action, but that judgment remained unsatisfied.

At the trial it appeared that the goods for the price of which the action was brought had been ordered by the Countess and delivered at Apethorpe Hall, in Northamptonshire, where the defendants resided. The price of the goods so delivered by the plaintiffs prior to an arrangement entered into in July, 1899, as after mentioned, amounted to 146*l.* The price of the goods so delivered by the plaintiffs after that arrangement amounted to 264*l.*

At the time of the trial the Earl of Westmoreland was absent in South Africa. Evidence was given by Mr. Royds, a member of the firm of solicitors acting for the Earl, which was substantially to the following effect. In July, 1899, the domestic expenditure of the defendants having exceeded the amount of income available to meet it, an amount of 1500*l.*, which included the amount then owing to plaintiffs, was due to various creditors. The net annual income of the Earl was about 2500*l.*, and the Countess had an annual income of 400*l.* of her own. In July, 1899, a discussion took place between Mr. Royds, acting partly for the Earl and partly for relations desirous of assisting him, and the defendants as to money matters. The Earl said that he would not be liable for the debts which his wife had incurred; but on the advice of Mr. Royds he agreed to pay them, if he could find the money. The Earl said that he wished in future to manage the household himself, but the Countess would not agree to that. It was ultimately agreed that the Earl should set aside out of his income an allowance of 2000*l.* a year for household expenses, which was to be paid into a separate banking account, upon which either the Earl or the Countess might draw for such expenses only, that the Countess should provide for her dress and other personal expenses out of her own income of 400*l.* a

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year, and that the Countess was not to incur any expenses for the household beyond the amount of 2000*l.* so allowed. It appeared that the Earl had paid into the account the amount of 2000*l.* a year as agreed. The plaintiffs had no notice of the above-mentioned arrangement. Shortly after July, 1899, a sum of 1200*l.* was forthcoming, which was distributed by cheques drawn by Mr. Royds among the various creditors, the plaintiffs receiving 50*l.* on account of the amount then due to them, for which credit was given by the plaintiffs' particulars. The questions left by Phillimore J. to the jury and their answers thereto were as follows. (1.) Was the Earl liable for goods supplied prior to July, 1899? Yes. (2.) As to goods supplied since that date, (*a*) Were they necessaries? Yes. (*b*) Did the Earl give his wife a sufficient allowance for household expenses? Yes. (*c*) Did the Earl prohibit his wife from incurring any household expenditure except out of the agreed allowance? Yes. (*d*) Did the Countess in ordering from the plaintiffs act as agent for the Earl jointly with herself, or for the Earl only, or for herself only? For the Earl and herself jointly. (*e*) To whom did the plaintiffs give credit? To the Earl in the name of the Countess.

The learned judge gave judgment against the Earl of Westmoreland for the price of the goods supplied both before and after July, 1899. Application was made by the Earl for judgment or a new trial.

Gore-Browne, K.C., and *G. A. Bonner*, for the defendant, the Earl of Westmoreland. The plaintiffs' claim on the face of the writ, and as developed at the trial, is against the husband and wife jointly in respect of goods supplied on the orders of the wife. There is no evidence of any such joint liability; and the findings of the jury appear to negative its existence. It is now settled by the decisions in *Jolly* v. *Rees* (1) and *Debenham* v. *Mellon* (2) that, in the case of a husband and wife living together, the question of the authority of the wife to pledge her husband's credit is one of fact, like that in any ordinary case of agency. In such a case there

(1) (1864) 15 C. B. (N.S.) 628.

(2) (1880) 6 App. Cas. 24.

must, in order to render the husband liable, be actual authority given by him, either expressly or by implication, or ostensible authority by virtue of some action by him holding out the wife as his agent. Where the husband and wife have lived together and the wife has managed the household, the presumption arises that the husband authorized the wife to pledge his credit for necessaries for the household, but that presumption is at once rebutted on proof that the husband made an allowance, which was not illusory, for household expenses, and forbade his wife to pledge his credit. The presumption which arises from cohabitation is a presumption of actual authority by implication. There is no question in such a case of ostensible authority by holding out, unless the husband has done such acts, or so conducted himself, as to entitle a tradesman dealing with the wife to rely upon some appearance of authority for which the husband ought to be held responsible: see per Lord Selborne L.C. and Lord Blackburn in *Debenham* v. *Mellon*. (1) There was no evidence in this case of any conduct by the husband which could give rise to an ostensible authority in the wife. Phillimore J. appears to have thought that there was some distinction for this purpose between articles of dress supplied to the wife and provisions or other necessaries consumed or used in the household; but it is submitted that there is really no such distinction. Applying the principles laid down by the before-mentioned authorities to the claim in respect of goods supplied after the arrangement in July, 1899, it is submitted that upon the facts and the findings of the jury the Earl is entitled to judgment as regards the price of these goods on the ground that the Countess had no authority to pledge his credit either jointly with her own or otherwise.

Further, with regard to all the goods, both those supplied before the arrangement of July, 1899, and those supplied after it, the Earl is entitled to judgment on the following grounds. As already stated, the cause of action appearing in the indorsement on the writ and relied on at the trial is a joint cause of action against the Earl and the Countess. In the first place, there is no evidence whatever to support such a cause of action, and, therefore, in the absence of an amendment, which ought not at this stage to be allowed, the plaintiffs must fail. There is no evidence of any credit given by the plaintiffs to the defendants jointly. The orders were given by the Countess, and the goods were debited in her name in the plaintiffs' books. There is no evidence of any actual authority given by the Earl to the Countess to pledge their joint credit. If the plaintiffs rely on any legal presumption arising from the fact of cohabitation, that presumption is of an authority to pledge, not the joint credit of the husband and wife, but the sole credit of the husband. Secondly, if there is no joint liability, the provisions of Order XIV., r. 5, which provide that the signing of judgment under that order against one defendant shall not prejudice the plaintiff's right to proceed with the action against another defendant, cannot apply. In this view the plaintiffs' right of action must be alternatively against the wife, as agent for an undisclosed principal, and as such liable at the election of the plaintiffs to be sued herself as principal, or against the husband as the real principal; for, if the wife was not acting as agent, she alone, and not the husband, would be liable. In such a case the general principle of the common law with regard to election applies, and the plaintiffs cannot recover against both the agent and the principal. The plaintiffs by electing to sign judgment against the Countess, and continuing to hold to that election down to trial, have debarred themselves from insisting on a sole liability on the part of the Earl, which is really inconsistent with the liability of the Countess. Order XIV., r. 5, cannot mean that, when the right of action against two defendants is alternative, and the liability of one is inconsistent with that of the other, the recovery of judgment against one shall not prejudice the right to proceed against the other. [They cited on this point *King* v. *Hoare* (1); *Kendall* v. *Hamilton* (2); *Priestly* v. *Fernie* (3); *Scarf* v. *Jardine* (4); *Hammond* v. *Schofield* (5); *McLeod* v. *Power*. (6)]

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(1) 6 App. Cas. 24, at pp. 32 and 36.

(1) (1844) 13 M. & W. 494.

(2) (1879) 4 App. Cas. 504.

(3) (1865) 3 H. & C. 977.

(4) (1882) 7 App. Cas. 345.

(5) [1891] 1 Q. B. 453.

(6) [1898] 2 Ch. 295.

Macaskie, K.C., and *Montague Shearman*, for the plaintiffs. With regard to the goods supplied before the arrangement of July, 1899, there is no suggestion of any allowance made by the husband to the wife for household expenses; and under those circumstances it is clear, on the authorities already cited, that there is a presumption of some authority given by the husband to the wife to pledge the husband's credit. It is submitted that, under the circumstances of the case, it may fairly be presumed from the evidence that the authority given was to pledge the joint credit of the husband and wife. If the liability was joint, then, by virtue of Order XIV., r. 5, the right of the plaintiffs to recover against the Earl is not prejudiced by their having obtained judgment against the Countess: see *Weall* v. *James*. (1) The answer of the jury to question 1 is not really inconsistent with the presumption that the authority was to pledge the joint credit of the defendants. There being no question at the trial as to the liability of the wife, that having been admitted, the whole question was as to the liability of the husband. The footing upon which the plaintiffs sued, and upon which they put their case at the trial, and still desire to put it, was that of there being a joint liability on the part of the husband and wife for the price of the goods supplied; and the jury by their answer really meant to find that such a liability existed. With regard to married persons belonging to the more affluent classes, especially since the Married Women's Property Acts, it is commonly the case that both the husband and the wife have property; and, when in such a case they are cohabiting together and necessaries are supplied to be used for the purposes of the common household, it is not an unreasonable presumption in favour of a tradesman supplying such necessaries that the intention is that the property of both shall be applicable to payment for them, and that authority is given by the husband to pledge his credit jointly with that of his wife.

With regard to the goods supplied after the arrangement of July, 1899, it is submitted that, upon the true view of the evidence as to that arrangement, the case stands on the same footing as to those goods as it does with regard to the goods supplied before the arrangement. The Earl never expressly forbade the Countess to pledge his credit, and the true view of the arrangement is that he did not thereby forbid the Countess to pledge his credit for necessaries to be supplied to the household, but authorized her to pledge it with the limitation that she must not do so to a greater extent than 2000*l*. a year. If so, the case stands on the same footing as that of any other agent who is authorized by a principal to manage a business, and for that purpose to pledge the principal's credit, with a secret limitation of amount, of which the persons dealing with the agent have no notice; in which case the principal is liable, although the agent, in breach of his duty to his principal, has exceeded the amount limited: see *Edmunds* v. *Bushell* (1); *Watteau* v. *Fenwick*. (2) There was no evidence that, at the dates when the orders for the goods supplied by the plaintiffs were given, the Countess had exceeded the limit of her authority, namely, 2000*l*. There was evidence of an authority given by the husband with regard to the goods supplied prior to July, 1899, and no notice was ever given to the plaintiffs of any withdrawal of that authority. The sum of 50*l*. paid to the plaintiffs after July, 1899, must be taken to have been paid by the Earl, and that payment is evidence of a holding out of the wife as authorized to order necessaries for the household. The findings of the jury on the several branches of the second question left to them by the judge, fairly construed, mean that there was authority given by the husband to the wife to pledge their joint credit for goods, and that the joint credit was pledged under the name of the wife.

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(1) (1893) 68 L. T. 515.

Assuming that the evidence in this case does not point to a joint liability on the part of the husband and wife, but merely to a separate liability of the husband, there is nothing in the fact of the plaintiffs' having signed judgment under Order XIV. against the wife to prevent their enforcing the right which upon that hypothesis they have against the husband. The reason why obtaining judgment against one of two joint debtors was held to bar an action against the other is that the judgment works a merger of the original debt; but in the case of an alternative right of action against one or other of two persons there must be a conclusive election to take the liability of one in order to bar an action against the other. Under the present system two defendants may be joined against whom relief is sought either jointly, severally, or in the alternative. It is submitted that, where two are sued in one action alternatively, obtaining a judgment against one, which is in the nature of an interlocutory step, is not a conclusive election. Therefore, in such a case as this, if at the trial it turns out that the facts establish a sole liability on the part of the husband, the Court ought to allow such amendments in the proceedings as may be necessary to give effect to that liability. Election is really a question of intention. Obtaining a judgment against the wife at a time when the action was proceeding on the footing of a joint liability of the husband and wife, and when the plaintiffs supposed the liability to be joint, cannot shew an intention on their part to give up the sole liability of the husband. In the cases in which it has been said that recovery against one of two persons alternatively liable is a conclusive election to give up the liability of the other, the case of separate actions was contemplated. It is obvious that, if a plaintiff sues one of such persons alone and obtains judgment against him, that is a conclusive election, which prevents an action against the other from being maintainable; but the same considerations do not apply where the two are sued in the same action.

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(1) (1865) L. R. 1 Q. B. 97.

(2) [1893] 1 Q. B. 346.

Gore-Browne, K.C., was not called on to reply.

Collins M.R. This is an appeal by the defendant, the Earl of Westmoreland, against the judgment of Phillimore J. given in favour of the plaintiffs upon certain findings of the jury.

The action was commenced by a writ which on its face claimed as upon a joint liability of the Earl and the Countess of Westmoreland in respect of necessaries supplied by the plaintiffs upon the order of the Countess. In the action so commenced on the footing of a joint liability on the part of the defendants, the Countess submitted to judgment under

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Order XIV., and judgment was accordingly signed against her. In the events which have happened, the claim of the plaintiffs divides itself into two parts, one being in respect of goods supplied before July, 1899, and the other in respect of goods supplied after that date. Somewhat different considerations apply to the two parts of the claim. We have to deal with the case on the footing upon which the plaintiffs have all along put it, namely, on that of a joint liability of the defendants. The plaintiffs have conducted their case on that footing throughout, and not on that of a sole liability of the husband, as a principal for whom his wife acted merely as agent. The question, therefore, is whether there is any evidence of a joint liability of the defendants.

I will deal first with the period prior to July, 1899. It appears to me that, when the evidence as to that comes to be sifted, it does not at all point in the direction of a joint liability. Down to that period no personal interference by the Earl comes into the discussion. I agree that the facts that the defendants had a common establishment, and that goods were supplied by the plaintiffs for the purposes of that establishment upon the order of the wife, would, by themselves, in point of law constitute a primâ facie case against the husband; not, as has been well pointed out by the defendant's counsel, as being evidence of a holding out of the wife as his agent by the husband, but as raising a presumption of authority in point of fact, which is therefore capable of being rebutted by proof of circumstances shewing that there was in fact no such authority. What does the evidence given come to? It shews that there was a joint ménage, and orders were given by the wife for goods which were presumably consumed in that ménage; and there was also evidence of a payment later on of a sum of 50*l*. on account of those goods, which it was suggested must be treated as a payment made by the Earl. But, admitting all those facts, at the utmost all they could amount to is some evidence of an authority given to the wife to pledge the credit of the husband; they are no evidence whatever of an authority given to the wife to pledge the joint credit of herself and her husband. The jury, in answer to the first question left by the learned judge, have found that with regard to the goods supplied down to July, 1899, the Earl was liable; but the plaintiffs' counsel insist that that finding, having regard to what took place at the trial, must be read as meaning that the Earl was liable for those goods jointly with the Countess. But, if there be no evidence to support that finding, it cannot carry the case any further, and, as I have already said, I think there was no such evidence.

I now come to the goods which were supplied after July, 1899. At this point the Earl is personally introduced into the story. Evidence was given by the Earl's solicitor to the effect that at that time the Earl was greatly distressed by the fact that the expenditure of the household had exceeded the income available to meet it, and an arrangement was in consequence made between the Earl and the Countess. The effect of the evidence is in my judgment that the arrangement amounted to this, namely, that the Countess should not in future have any authority to pledge the Earl's credit, and that a fund should be provided for the household expenditure. The whole amount available by way of annual income belonging to either of the parties was taken into account. The income of the Earl being 2500*l.* a year, and the Countess having a separate income of 400*l.* a year, it was agreed that the Earl should provide out of his income an allowance of 2000*l.* a year for the household expenses, and the Countess should have her own income of 400*l.* a year for her personal expenses. It appears to me that this arrangement clearly involves a negation of the wife's having any authority to pledge the credit of her husband at all, and the case exactly comes, therefore, within the authority of *Debenham* v. *Mellon* (1) and *Jolly* v. *Rees*. (2) The arrangement as to the allowance of 2000*l.*, which I have mentioned, clearly implied, I think, that that fund was to be substituted for any authority of the wife to pledge the husband's credit, which might primâ facie be presumable from the fact of cohabitation, and therefore negatives the existence of such an authority. The plaintiffs' counsel relied on the point that the evidence did not shew that the Earl in terms told the Countess

(1) 6 App. Cas. 24.

(2) 15 C. B. (N.S.) 628.

that she must not pledge his credit. But, when one looks to the essential meaning of such an arrangement and the circumstances in which it was made, namely, that the Earl was protesting against the amount of the expenditure, and that he would not be liable for such expenses, and that on that an arrangement was made for a fixed allowance, I think it is obvious that the meaning of the arrangement was, not that the Countess should have authority to pledge her husband's credit to a certain amount, but that she should not have authority to pledge his credit at all. The meaning is, "I give you that allowance, and out of that, and that only, you must provide for the household expenses." In my opinion the fair interpretation of the answers given by the jury to the questions put to them is that that was the construction which they put upon the arrangement. The result is that the plaintiffs cannot rely on any presumption of authority arising from the fact of cohabitation, for any such presumption is at once negatived by the arrangement proved to have been made. The existence of any actual authority being thus rebutted, the plaintiffs can only succeed by shewing some facts which are evidence of an ostensible authority from the husband to the wife. Is there then any evidence of an ostensible authority in the wife to pledge the credit of herself and her husband jointly, for it is such an authority which the plaintiffs have to establish? I cannot see any such evidence. The circumstances of the case appear to me to negative anything like such an authority. The fact that the goods were supplied on the order of the wife does not give rise to any inference pointing to a joint liability. If anything, it is rather evidence of a separate liability on the part of the wife. The fact of the wife's having a separate income does not appear to have been known to the plaintiffs, and cannot alter the ordinary presumption which arises where the husband and wife are carrying on a joint ménage. As I have already said, that presumption is merely of an authority to pledge the sole credit of the husband, which as regards the goods supplied after July, 1899, has been rebutted. The plaintiffs' counsel relied on the fact that either the husband or the wife could draw upon the fund for household expenses.

But that fact was not known to the plaintiffs, and can give rise to no inference of any authority to create a joint liability. If there be any evidence of a holding of the wife out as having authority after July, 1899, it is not of holding her out as having authority to pledge the joint credit of herself and her husband. No question was left to the jury with regard to any holding out of the wife as agent. I doubt whether there was any evidence of such a holding out, but neither party appears to have asked the judge to put any such question. If there was any such evidence, it was evidence of an ostensible authority to pledge the sole credit of the husband. It appears to me that, having regard to the way in which the case has been put, we must deal with it on the footing that the claim is upon a joint cause of action against the husband and wife. As I have said, I see no evidence of a joint liability by the defendants, and I do not think that the jury meant to find such a liability. In answer to the question whether the Countess in ordering the goods acted as agent for the Earl jointly with herself, or for the Earl only, or for herself only, the jury find that she acted for the Earl and herself jointly, and, in answer to the question, To whom did the plaintiffs give credit, they find that they gave credit to the Earl in the name of the Countess. Putting it at the highest it comes to this, that, whatever view the jury took of the agency of the wife, they found that in point of fact the credit was given to the husband. I do not see how on those findings it can be said that the jury has found a joint liability. I think these considerations dispose of the case on the footing that the claim is based upon a joint liability. There is no evidence to justify a finding that there was such a liability, and the jury have not found that there was.

The plaintiffs' counsel have argued that the statement of claim might have claimed against the defendants jointly, severally, or in the alternative. It does not, however, so claim, and the plaintiffs' counsel still insist that the case must be treated on the footing of a joint liability. As I have said, I think that under the circumstances we must deal with the case on that footing; but I think it right to consider what

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difference it would make if it were open to the plaintiffs now to treat the case on the footing of a joint or several liability. I do not think that, even so, they would carry their case any further. They have signed judgment against the wife for the whole amount claimed. There is nothing in the judgment to indicate that it is a judgment in respect of a joint liability rather than in respect of a several liability. I have dealt with the question of a joint liability; but, upon the plaintiffs' contention that for this purpose the action is to be treated as one against the defendants severally or in the alternative, we must deal with the claim against the Countess as made against her severally as being herself a principal in respect of the contract for the goods supplied. The plaintiffs, having obtained judgment against the Countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other. In such a case, if it is sought to render the agent liable, it must be by treating the agent as a principal, to the exclusion of the liability of the real principal. If it is sought to render the real principal liable, then the agent must be treated as such and not as principal. The plaintiffs cannot recover against both. If they choose to take judgment against the wife, they cannot consistently with that have judgment for the same amount against the husband. The result of the whole case is that the judgment against the husband cannot be sustained on the basis of the liability being joint; and, if it be sought to sustain it on the ground that the action must be treated as if brought in respect of a several liability of one or other of the defendants alternatively, then, judgment having been signed against the wife on the footing that she was liable for the price of the goods as a principal, the plaintiffs cannot afterwards obtain judgment for the same amount against the husband on the footing that the wife was his agent in ordering the goods. It was suggested that, the husband and wife being joined as defendants in one action, the judgment against the wife before the trial must be looked upon as merely an interlocutory proceeding, and that, when on the trial it appeared that the other defendant was liable, the plaintiffs' having signed judgment against the wife could not be deemed a conclusive election on their part to take the liability of the wife. The case in the present point of view does not seem to me to come within the special provision made by rule 5 of Order XIV., which enables a plaintiff who obtains judgment under that order against one of two defendants in an action to go on with the action against the other. That provision does not, I think, apply to the case of alternative liability. Therefore, we must look at the case in the light of general principle; and it seems clear, so regarding it, that, if there has been a conclusive election by the plaintiffs to adopt the liability of one of two persons alternatively liable, they cannot afterwards make the other liable: see *Scarf* v. *Jardine*. (1) Here, on the hypothesis that the writ covers an alternative claim against the husband or the wife, the issuing of the writ will not involve any election; but, if on the road to trial of the action the plaintiffs accept judgment against one of the two defendants, that may be called an interlocutory step, but it is a complete judgment upon which execution may be issued against that defendant and which alters her relation to the other defendant; and I think it is impossible to say that it is not a conclusive election to make the wife liable to the exclusion of the liability of the husband. A judgment against one of two defendants jointly liable under Order XIV. would apparently have the effect of preventing the plaintiff from recovering against the other, but for the special provision made by rule 5 of the order. It appears to me, therefore, that, even if we were to allow an amendment of the claim so as to make it cover an alternative liability by the husband, the plaintiffs have precluded themselves from insisting on that liability. For these reasons I think that the plaintiffs fail in establishing a joint liability on the part of the husband and wife, and, even if an amendment were allowed, they would equally fail as against the husband alone. Consequently, the judgment of the learned judge must be set aside, and judgment entered for the defendant, the Earl of Westmoreland.

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(1) 7 App. Cas. 345.

Romer L.J. It appears to me that this application should succeed. I do not think that any facts were proved in this case upon which the jury could reasonably find that the Countess contracted these debts on behalf of herself and her husband jointly; nor do I think that they did in fact so find. A joint liability cannot be implied merely from the fact of the husband and wife residing together in the husband's house and the wife's ordering goods for the household; and it appears to me that the fact that in this case, in addition to the husband's income which was 2500*l.* a year, the wife had a small separate income of 400*l.* a year cannot make any difference in this respect. These are the only facts, I think, upon which the plaintiffs could rely as tending to shew a joint liability of the husband and wife in respect of the goods supplied down to July, 1899; and, with regard both to those goods and the goods afterwards supplied, if one looks at the arrangement which was then made, one finds a strong reason against supposing that there was any such joint liability in the fact that the arrangement was that the whole of the household expenses were to be provided for out of the fund to be supplied by the husband out of his income. There is, therefore, as it seems to me, no evidence in support of a joint liability of husband and wife. That being so, in my opinion the claim of the plaintiffs as against the husband must altogether fail, for the action was launched, and has been fought throughout, on the footing of such a joint liability. It is not a case of any misunderstanding or ignorance of their rights on the plaintiffs' part. The plaintiffs' counsel have stated before us on this appeal that their case has been based throughout on a joint liability of the husband and wife. On that basis the plaintiffs must fail now as against the husband. Even if it were open to the plaintiffs at this stage to treat the action as including an alternative claim against the husband, as being solely liable as principal in respect of goods ordered by his wife as his agent, the plaintiffs are met by the difficulty that they have obtained judgment against the agent, the wife, treating her as being the party liable on her own account. For the reasons already mentioned I think that is fatal to the plaintiffs' claim against the husband. It seems to me, therefore, that under these circumstances judgment ought to be entered for the defendant, the Earl of Westmoreland.

MATHEW L.J. I have come to the same conclusion. In my opinion there is no evidence of a joint liability on the part of the Earl and the Countess in respect of the goods supplied down to July, 1899. As to those goods there could only be the ordinary presumption which arises from the fact of cohabitation and of the wife's being manager of the household, namely, that the wife had implied authority to order necessaries for the household as agent for the husband. With regard to the goods supplied after July, 1899, there was ample evidence to support the finding of the jury that as to those goods the wife had no authority to pledge the husband's credit. A fund was provided by the husband for the household expenses, and the jury have found, upon the evidence as to the arrangement made in July, 1899, that the wife was forbidden to order the goods as agent for her husband. There was no evidence of a joint liability of the husband and wife, or indeed of any liability on the husband's part. Such being the effect of the evidence as to the two portions of the claim respectively, what is the result as regards this appeal? From what the plaintiffs' counsel have said, it may be that the alternative of a sole liability on the part of the husband was present to the minds of the plaintiffs' advisers, but, on consideration of the matter, it appeared to have been thought the better course to secure a judgment against the wife on the footing of a joint liability; and the plaintiffs' counsel have persisted to the last in claiming against the husband on that footing. Assuming that it is, nevertheless, open to the plaintiffs now to set up an alternative claim based upon a sole liability on the part of the husband, I think that, on that assumption, in point of principle the case stands on the same basis as if an action for the price of the goods supplied had first been brought against the wife alone,

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MOREL BROTHERS & Co., LIMITED v. WESTMORELAND (EARL OF).

Mathew L.J.

and judgment recovered in that action against her, and then, that judgment being unsatisfied, a second action had been brought against the husband for the price of the same goods. The decisions shew that such an action cannot be maintained. This principle applies, in my opinion, to the present case. There was a final and conclusive election by the plaintiffs to accept the liability of the wife, and, after that election, they cannot insist upon a sole liability on the part of the husband. The result is that the plaintiffs' claim against the husband altogether fails.

There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases; but, if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority. I think that the application to enter judgment for the Earl of Westmoreland ought to be allowed.

Application for judgment allowed.

Solicitor for plaintiffs: *A. L. Rayner.*
Solicitors for defendant: *Royds & Rawstorne.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1902
Nov. 19.

HAMLYN *v.* JOHN HOUSTON & CO.

Partnership—Principal and Agent—Scope of Authority—Tortious Act of one Partner—Liability of Firm—Bribing Servant to disclose Employer's Secrets—Partnership Act, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 5.

Where it was in the course of the business of the defendants, a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, and one of the partners obtained such information by bribing a clerk of the plaintiff, a competitor in business, to break his contract of service by dishonestly and improperly communicating to him knowledge obtained in the course of the clerk's employment:—

Held, that both the partners were responsible in damages to the plaintiff for the action of one of them as aforesaid, on the ground that it was within the general scope of the authority given to him as a partner to conduct the business of the firm.

Application for judgment or a new trial in an action tried before Kennedy J. and a jury.

The action was brought to recover damages against the defendants, in substance, for having induced a clerk in the plaintiff's employ to break his contract of service with the plaintiff by disclosing confidential matters with regard to the plaintiff's business, whereby damage was occasioned to the plaintiff.

The plaintiff and the defendants were grain merchants. The defendants' firm consisted of one Houston, and one Strong, who by arrangement between them left the conduct of the business to Houston. It was a term of the clerk's employment by the plaintiff that he should not divulge the secrets of his employer relating to his business. It appeared that Houston had induced the clerk by bribes to give him information with regard to the names of plaintiff's customers, and contracts made, or tendered for, by the plaintiff, and to allow him to have possession of one of the plaintiff's books containing entries concerning contracts. In answer to questions left to the jury by the learned judge they found as follows. 1. Houston did induce and procure the plaintiff's clerk to break his contract of service with the plaintiff by dishonestly and improperly communicating to Houston knowledge obtained by him in the course of his employment in the plaintiff's office in regard to secret and confidential matters of his employer's business. 2. Damage was thereby occasioned to the plaintiff to the amount of 750*l*. 3. Houston so acted in order to obtain advantage in business for the defendant firm, and believing the action to be for the interest of the defendant firm. 4. It was in the course of the business of the defendant firm to obtain by legitimate means information in regard to the contracts made or tendered for with brewers and with buyers of grains by competing firms. 5. The moneys paid by Houston to the clerk were paid for or in consideration of the information which the clerk obtained for him as before mentioned. 6. The said moneys were the moneys of the defendant firm. 7. The defendant firm profited by what Houston did.

Upon these findings the learned judge entered judgment for the plaintiff for 750*l*.

E. Tindal Atkinson, K.C., and *G. Spencer Bower*, for the defendants. The action being against the firm, the question really is whether the defendant Strong is responsible as a principal for what the defendant Houston did, as being within the scope of the authority given by one partner to another. The provisions of the Partnership Act, 1890, s. 5, shew that the test whether a partner is responsible for an act done by another partner is whether the act is done " for carrying on in the usual way business of the kind carried on by the firm ": see also s. 7 of the Act. To procure information as to the secrets of a rival firm by bribing their clerk cannot be said to be an act done for carrying on in the usual way business of the kind carried on by the defendants. This is not an action brought to recover money or some other subject-matter in the defendants' possession, of which the plaintiff had been deprived through the action of Houston, as to which different considerations might apply; it is an action to recover damages from both the defendants in respect of Houston's acts, which must therefore be shewn to be in law the joint acts of the defendants. This is not a question of an agent employing unlawful means in pursuit of some lawful object within the general scope of his authority. The end proposed was in itself wrongful, namely, the procuring—it might be called stealing—of information which was really the private property of some one else. A charge of illegal conspiracy might have been maintained in respect of what was done. It is impossible to suppose that it was really in the usual course of defendants' business to obtain information as to the secrets of rival firms; and, even if it was within the scope of Houston's authority to obtain information, if possible, as to the contracts and tenders made by the plaintiff by legitimate means, it does not follow that it was within the scope of his authority to obtain such information under circumstances in which doing so really amounted to stealing it. It may be within the scope of a partner's authority to obtain money for the purposes of the firm; but it would not therefore be within the scope of his authority to steal money. The case is not like one in which an agent makes a fraudulent representation in the course of a transaction which it was clearly in the ordinary course of the business of his principal to carry out. Cases of this kind may be divided into three classes, in two of which the principal is responsible for the acts of the agent, while in the third he is not. The first is where the object, which the agent has in view, is within the general scope of his authority, and is lawful; and the means employed by him, though exceeding his authority as between himself and his principal, are lawful. The second is where the object, which the agent has in view, is within the general scope of his authority, and is lawful; and it may be obtained either by lawful or unlawful means, and the agent has used unlawful means. The third is where the object which the agent has in view is in itself unlawful. Here the object which the agent or partner had in view was unlawful and wrongful, namely, procuring information as to the secrets of a rival firm, information which was really their property, and the means employed were unlawful. In *Dyer* v. *Munday* (1) the criminal act was merely incidental to the object in view, which was lawful. In this case the object itself was unlawful.

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(1) [1895] 1 Q. B. 742.

[They also cited *Limpus* v. *London General Omnibus Co.* (1); *Poulton* v. *London and South Western Ry. Co.* (2)]

Ruegg, K.C., and *Montague Shearman*, for the plaintiff, were not called upon to argue.

COLLINS M.R. The decision of the learned judge in this case was, in my opinion, right. The defendant Strong appears to have been a sleeping partner in a firm consisting of himself and the defendant Houston, or, at any rate, he delegated the transaction of the whole of the firm's business to Houston. The jury have found that it was in the course of the business of the firm to obtain by legitimate means information in regard to contracts made or tendered for with brewers and with buyers of grains by competing firms. What Houston did for the purpose of obtaining information, which, according to the finding of the jury, it was within the scope of his authority to obtain by legitimate means, was to bribe the clerk of the plaintiff, who was a competitor in business, to give him access to documents belonging to the plaintiff; indeed, it would appear that he actually had possession of one of the plaintiff's books for a time. It was argued for the defendants that this action by Houston was so completely outside the scope of the authority given to him that the defendants' firm cannot be responsible for it in an action brought against them by the plaintiff for damages thereby occasioned to him. The defendants' counsel have endeavoured to frame a definition with regard to what is and what is not within the scope of an agent's authority so as to render his principal liable. They suggested that, where the end sought to be obtained by the agent is in itself illegal, and the means employed to accomplish it are illegal, it cannot be said that the action of the agent is within the scope of the general authority given to him to conduct a business, but that it is otherwise where the end and the means employed are legal, or where the end is legal and the means of obtaining it may be legal or illegal. Trying this case by the test so suggested, was the end

(1) (1862) 1 H. & C. 526.

(2) (1867) L. R. 2 Q. B. 534.

to be obtained here in itself illegal? The defendants' counsel say that it was, but it does not appear to me to be so. According to the finding of the jury it was part of the defendants' business to obtain information as to the contracts and tenders of competitors in business, and, the more secret these matters were, the greater was the value of that information to the defendants' firm. The jury have in effect found that it was within the scope of the authority given to Houston to obtain such information by legitimate means, and I do not see that there was anything illegal in so obtaining it. It is too well established by the authorities to be now disputed that a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him, and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority. If the act done by the agent is within the general scope of the authority given to him, it matters not for the present purpose that it was directly contrary to the instructions of his principal, or even that it may have been an offence against society itself. The test is that which is applied to this case by the learned judge. Was it within the scope of the authority given to Houston to obtain this information by legitimate means? If so, it was within the scope of his authority for the present purpose to obtain it by illegitimate means, and the defendants are liable. That is the law as expressed in the Partnership Act, 1890, and as laid down by decisions previous to that Act, in which it has been held that a principal is liable for the fraud or other wrongful act of his agent if committed within the scope of his employment. This doctrine does not appear to rest upon the notion of the principal's holding out the agent as having authority. The grounds upon which it seems to rest, as explained in cases such as *Barwick* v. *English Joint Stock Bank* (1), appear to be that the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal; and that, the principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him. For these reasons I think this application must be dismissed.

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(1) (1867) L. R. 2 Ex. 259.

ROMER L.J. concurred.

MATHEW L.J. I agree. A little confusion has been introduced into this case by the reference made to the criminal law. It is not suggested that Houston's partner would be liable criminally; the question is only one of civil liability. The rule of law applicable is perfectly plain. The question is whether the action of Houston was within the scope of his authority for the purpose of making the firm liable. I think the jury were entirely warranted in finding that Houston was authorized to obtain information as to the contracts and tenders made by competing firms by legitimate means. He did obtain such information by illegitimate means. It being within the scope of his authority to procure the information, it is immaterial for the present purpose whether the acts which he committed in order to procure it were fraudulent or even criminal or not, and his partner is responsible for those acts.

Application dismissed.

Solicitors for plaintiff: *Wood & Wootton.*
Solicitor for defendants: *C. T. Wilkinson.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1902
Nov. 21.

REYNOLDS *v.* ASHBY & SON, LIMITED.

Fixtures—Machinery affixed to Freehold—Presumption of Law—Trade Fixtures—Mortgage—Hire-purchase Agreement—Rights of Mortgagee against Owner of Machinery—Licence to remove Trade Fixtures—Entry of Mortgagee into Possession.

Machines were supplied by the plaintiff on the hire-purchase system to the lessee for a long term of years of a factory, which he had mortgaged. The machines were affixed to the premises by the plaintiff's workmen by means of upright bolts let into the floor, which passed through holes in the bases of the machines, and upon which nuts were screwed. By the terms of the hire-purchase agreement the machines were not to become the property of the mortgagor until the last of a series of payments for their hire had been made by him, and, if default were made in those payments, the plaintiff was to have power to determine the hiring and remove the machines. The mortgagor failed to make the specified payments. The mortgagees having entered into possession of the factory, the plaintiff gave notice to determine the hiring, and claimed to remove the machines, but the mortgagees refused to give them up, claiming them as fixtures. In an action brought by the plaintiff against the mortgagees to recover the machines or their value, the judge held, on the authority of *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, that the machines were fixtures, and gave judgment for the defendants without leaving any question to the jury.

Held, that the decision of the judge was right.

Leigh v. *Taylor*, [1902] A. C. 157, discussed.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, distinguished.

Chidley v. *West Ham Churchwardens*, (1874) 32 L. T. 486, commented upon.

Application by the plaintiff for judgment or a new trial in an action tried before Lawrance J. with a jury.

The action was for the recovery of certain machinery or its value.

It appeared that land in Reading was, by indenture of underlease dated February 2, 1900, demised to one Holdway for the residue, less twelve days, of a term of ninety-nine years from September 29, 1892, granted by the head lease. In April, 1900, Holdway was engaged in erecting a factory upon the land so demised to him for the purpose of carrying on therein a joinery business.

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LIMITED.

By an indenture of mortgage, dated April 7, 1900, and made between Holdway, thereinafter called the mortgagor, and one Burrows, thereinafter called the mortgagee, after reciting that the mortgagor had arranged to build a factory and buildings on the demised premises in accordance with plans and specifications approved by the mortgagee, and the mortgagee had agreed to make certain advances to the mortgagor to enable him to do so, in order to secure repayment of the same, the mortgagor assigned the demised premises to the mortgagee for the before-mentioned term by way of mortgage, "together with the buildings, fixtures, machinery, and fittings erected thereon." Holdway assigned the term subsequently by way of second mortgage to one Hatt, and on August 27, 1900, by way of third mortgage to the defendants. The defendants bought up the interests of the prior mortgagees, and on December 17, 1900, took transfers of their mortgages.

On August 30, 1900, Holdway entered into a hire-purchase agreement with the plaintiff, who was a manufacturer of machinery, under which the machinery in question was supplied by the plaintiff for use in the factory, and affixed to the premises as after mentioned. By that agreement the plaintiff agreed to let the machinery, and Holdway agreed to hire it, and to pay for the hire of it by the payments, and at the times, specified in a schedule to the agreement. It was further agreed that, so soon as those payments should have been duly made, the machinery should become the property of Holdway, but, if Holdway should make default in punctual payment of any of the hire payments, then the plaintiff might determine the hiring of the machinery and enter upon Holdway's premises and resume possession of the machinery; and that the agreement should not be construed to operate in any way as a contract for the sale of the machinery, but simply as an arrangement for the hire of it, subject to the provision thereinbefore contained, and, until the last of the payments was made, the machinery should continue to be the sole and absolute property of the plaintiff.

The machinery consisted of heavy carpenter's apparatus, such as lathes, planes, saws, and other tools driven by steam-power, which were affixed to the premises by the plaintiff's workmen in the following manner. Concrete blocks were let into the floor of the building, in which were embedded upright iron bolts projecting above the concrete. When the machines were placed in position, these bolts passed through holes in the bases of the machines, which were fixed by means of nuts screwed down upon the bolts. The machines could be removed by unscrewing the nuts and lifting the machines off the bolts. The steam-power was conveyed to the machines by means of shafting and bands connected with a steam-engine. There was evidence that such machines could be, and often were, used without being fixed to the premises, but it was better to have them steadied by being so fixed—in order to avoid vibration, and to prevent the machine from shifting its position.

In November, 1900, Hatt, the second mortgagee, entered into possession of the factory under his mortgage, and let it to one Paterson as a weekly tenant, and Paterson subsequently, upon the defendants' buying up Hatt's interest, took a lease of the factory from them. Shortly after Hatt's entering into possession, as before mentioned, the plaintiff gave notice to determine the hiring and claimed to remove the machinery, Holdway having made default in paying the instalments under the hire-purchase agreement. The defendants refused to give the machines up, claiming them as fixtures which had passed to them as mortgagees. The learned judge at the trial held, on the authority of *Hobson* v. *Gorringe* (1), that the machines had become fixtures, and the property in them had therefore passed to the defendants; and he accordingly gave judgment for the defendants without leaving any question to the jury.

H. Reed, K.C., and *Rowlatt*, for the plaintiff. Attachment to the freehold does not necessarily, and in every case, constitute a thing a fixture in any sense of the term. A thing may be affixed in such a manner and under such circumstances as to remain a mere movable chattel, as for instance in the case of a carpet nailed down with tacks, or a picture secured to a wall by nails: *Hellawell* v. *Eastwood.* (1)

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(1) [1897] 1 Ch. 182.

[COLLINS M.R. Has the conclusion of fact in that case, as distinguished from the principle there laid down, been approved of in any subsequent case?]

In *Chidley* v. *West Ham Churchwardens* (2) articles more completely annexed to the freehold than the machines in this case appear to have been held to be chattels, and therefore not rateable. The question whether an article has ceased to be a movable chattel, and become a fixture, must depend on the circumstances under which and the purpose for which it was annexed. That being so, upon the facts of this case the question ought to have been left to the jury. The question whether a thing is a fixture or not is a question of fact: see *Ex parte Cotton* (3); *Hellawell* v. *Eastwood.* (4) In *Climie* v. *Wood* (5) and in the previous cases of *Wood* v. *Hewett* (6) and *Lancaster* v. *Eve* (7) it was left to the jury. In subsequent cases it has arisen on special cases where the Court had power to draw inferences of fact. *Hobson* v. *Gorringe* (8) was a case in the Chancery Division, where the judge is judge both of fact and law, and it is submitted that the Court of Appeal in that case must be taken to have decided the question whether the machine there in question was a fixture or not merely as one of fact. Here, though the machines were to a slight extent affixed to the freehold, they were easily removable, and the fact that they did not belong to the mortgagor, but were under the hire-purchase agreement to remain the property of the plaintiff, is strong to shew that the purpose for which they were attached was not the improvement of the freehold. That fact was at any rate evidence which ought to have been left to the jury as rebutting any presumption which might otherwise arise from the attachment of the machines to the premises. Upon the facts of the case, particularly the fact that when these machines were affixed they did not belong to the mortgagor, it is submitted that the true inference, or at any rate an inference which a jury might reasonably draw, is that these machines were fixed as they were merely to steady them and for their more convenient use as tools, and not with any intention of making them part of the premises. In the case of *In re De Falbe* (1), the judgment in which was affirmed in *Leigh* v. *Taylor* (2), it was held that tapestries structurally attached to the freehold remained mere movable chattels. That case is a very strong authority in point of principle for the plaintiff, and shews that at any rate there was a question for the jury.

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(1) (1851) 6 Ex. 295.
(2) 32 L. T. 486.
(3) (1842) 2 M. D. & D. 725.
(4) 6 Ex. 295, at p. 312.
(5) (1868) L. R. 3 Ex. 257; (1869) 4 Ex. 328.
(6) (1846) 8 Q. B. 913.
(7) (1859) 5 C. B. (N.S.) 717.
(8) [1897] 1 Ch. 182.

[MATHEW L.J. Was not that case decided on the ground that the tapestries, though fixtures, were merely affixed as temporary ornaments, and were therefore removable as between tenant for life and remainderman ?]

It is submitted that the tapestries were really treated as chattels. No suggestion could be made in this case that the advances by the mortgagees were made on the faith of this machinery being part of the mortgage security, for it was affixed after the premises were mortgaged.

[They also cited on this point *Longbottom* v. *Berry*. (3)]

In *Gough* v. *Wood & Co.* (4) it was held that, if a mortgagee leaves a mortgagor in possession, and allows him to carry on business in the mortgaged premises, he must be taken to license him to carry on business in the usual way, and therefore to disannex and dispose of fixtures which it may be in the ordinary course of business to disannex and dispose of. These hire-purchase agreements with regard to machinery such as this are now common in business and their terms are well known; and it would be a great hardship on those who under such agreements let out machinery, which is slightly annexed to the premises for its better use, that it should become the property of a mortgagee of the premises. According to *Gough* v. *Wood & Co.* (4) it is to be presumed that a mortgagee who leaves a mortgagor in possession licenses him to enter into

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(1) [1901] 1 Ch. 523.
(2) [1902] A. C. 157.
(3) (1869) L. R. 5 Q. B. 123.
(4) [1894] 1 Q. B. 713.

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such a hire-purchase agreement, and acquiesces in the removal of the machinery in accordance with its terms. On the authority of *Gough* v. *Wood & Co.* (1), the plaintiff could have resumed possession of these machines as against the mortgagees, if he had done so before they took possession. If so, it is difficult to see how it can make any difference that the mortgagees should have taken possession, for the supposed licence must be taken to have been given before the machinery was affixed, and, if the mortgagees had acquiesced in the affixing of the machinery to the premises on the terms of the hire-purchase agreement, they could not revoke that licence by entering into possession. It would follow that they must allow the owner of the machinery to remove it within a reasonable time.

[They also cited on this point *Sanders* v. *Davis* (2); *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (3)]

J. A. Hamilton, K.C., and *Keeling* (*A. Powell, K.C.*, with them), for the defendants. The facts in this case shewed that, as a matter of law, these machines were fixtures. In some cases there may be disputes as to the facts, and preliminary questions of fact for the jury; but the ultimate question whether a thing is a fixture or not is one of law. Here there is no dispute as to the facts, and consequently there was no question of fact for the jury. It was suggested by Blackburn J. in *Holland* v. *Hodgson* (4) that, where an article is annexed even slightly to the land, the presumption is that it is a fixture, and the onus lies on those who assert that it remains a chattel of adducing facts which rebut that presumption. That principle was adopted in *Hobson* v. *Gorringe* (5), and it was there held that the existence of a hire-purchase agreement as in the present case was not evidence to rebut the presumption that the machine was a fixture. It is clear from the terms of the judgment in that case that the question was dealt with as one of law; and there were many previous cases in which the

(1) [1894] 1 Q. B. 713.

(2) (1885) 15 Q. B. D. 218.

(3) [1892] 1 Ch. 415.

(4) (1872) L. R. 7 C. P. 328.

(5) [1897] 1 Ch. 182.

question whether a thing was a fixture or not was dealt with upon that footing. Assuming that these machines were trade fixtures, it is clear law that, even though removable as between landlord and tenant, they became part of the mortgage security, and passed to the mortgagees: *Climie* v. *Wood* (1); *Holland* v. *Hodgson*. (2) It is impossible on the facts seriously to contend that these machines remained mere movable chattels. There was really no evidence to support a finding of the jury to that effect. The cases of *In re De Falbe* (3) and *Leigh* v. *Taylor* (4) did not decide that the tapestries there in question were mere movable chattels, but that they were fixtures which were removable as between tenant for life and remainderman. The case of *Chidley* v. *West Ham Churchwardens* (5), as explained in *Tyne Boiler Works Co.* v. *Longbenton Overseers* (6), has no bearing on the present case.

The case of *Gough* v. *Wood & Co.* (7) was a very exceptional case, and the principle of it ought not to be extended. It would be very dangerous that the law with regard to fixtures as between mortgagor and mortgagee, which was thought to be settled by *Climie* v. *Wood* (1) and *Holland* v. *Hodgson* (2), should be made subject to an exception, which would render it impossible for a mortgagee to be certain of his position. A mortgagee may have advanced moneys or allowed them to remain unpaid on the faith that valuable fixtures formed part of the mortgage security. In the case of *Gough* v. *Wood & Co.* (7) the fixtures had been disannexed before the mortgagee took possession; and in *Hobson* v. *Gorringe* (8) the case was distinguished on that ground, and it was held that, when the mortgagee had entered into possession, the fixtures could not be disannexed. *Hobson* v. *Gorringe* (8) is really undistinguishable from the present case.

[They also cited *Huddersfield Banking Co.* v. *Lister & Son.* (9)]

H. Reed, K.C., in reply.

(1) L. R. 3 Ex. 257; 4 Ex. 328.
(2) L. R. 7 C. P. 328.
(3) [1901] 1 Ch. 523.
(4) [1902] A. C. 157.
(5) 32 L. T. 486.
(6) (1886) 18 Q. B. D. 81.
(7) [1894] 1 Q. B. 713.
(8) [1897] 1 Ch. 182.
(9) [1895] 2 Ch. 273.

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COLLINS M.R. This is an appeal from the decision of Lawrance J. who left no question to the jury, but decided the case upon the authority of *Hobson* v. *Gorringe*. (1) The point arises thus. The lessee of land for a term of ninety-nine years built a factory on the land, for which it was necessary for him to procure machinery. Before building the factory he had mortgaged the land by a deed which recited his intention of building the factory, and expressly mentioned fixtures in the parcels. That mortgage was followed by others, the last being a mortgage to the defendants, who ultimately bought up the interests of the prior mortgagees. The mortgagor, for the purpose of procuring machinery for the factory, entered into a hire-purchase agreement with the plaintiff, which contained the usual term that, if the instalments of the price of the machinery were not duly paid, the plaintiff should have a right to resume possession of it. The machinery, which was fixed in the manner described to us, consisted of machine tools, such as planes and saws, of a very substantial and weighty character, which were actuated by steam-power, and connected with one another, the whole constituting a system of machinery for carrying on the business of the factory. Before the date of the demand by the plaintiff to resume possession of the machinery on the ground of default in payment of the instalments under the hire-purchase agreement, one of the prior mortgagees had entered into possession of the premises; and, his rights having been acquired by the defendants, they have a right to say that, whatever right he possessed to insist on the machinery being left on the premises, they now possess. Therefore no question arises here as to what the rights of a person who lets goods under a hire-purchase agreement in such a case as this may be before the mortgagee has taken possession. The question is whether, under the circumstances which I have mentioned, the plaintiff was entitled to recover possession of the machinery as against the defendants. That question the judge decided for himself without leaving any question to the jury.

It is contended by the plaintiff's counsel that the evidence

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raised a question of fact which ought to have been left to the jury; and that, whether the learned judge's decision thereon was right or wrong, it was not a question for him to decide. The point is put thus. The plaintiff's counsel contend that the machines never lost the character of mere movable chattels; that they never became "fixtures," in the sense in which that word is used in questions between landlord and tenant, tenant for life and remainderman, and such like cases, namely, as meaning something which is annexed to the freehold, but is removable by the person who annexed it. Unless the plaintiff's counsel can carry the case as far as that; unless they can shew that the machines never became fixtures, and so were never part of the mortgage security, upon the authorities they must fail, subject to a point as to the effect of the conduct of the mortgagees in leaving the mortgagor in possession, with which I shall have to deal hereafter. The plaintiff's counsel contend that it is necessarily a question of fact for the jury whether, under such circumstances as existed in the present case, the machines had become fixtures or remained mere chattels. That point is the only one on which we have felt any difficulty in this case. We do not however approach it as res integra. There are a series of decisions in which the matter was apparently treated as one of law, and in which it was decided that chattels attached to premises in a manner similar to that in which this machinery was attached were to be regarded as fixtures. In the case of *Hobson* v. *Gorringe* (1), upon the authority of which the learned judge decided this case, the mode of attachment appears to have been identical with that employed in the present case, and the only possible distinction between the two cases is that in that case the mortgagor was owner in fee of the premises, whereas here the mortgagor is the owner of a term of ninety-nine years. In that case, after a long discussion during which all the authorities were referred to, it was held by the Court of Appeal that the proper inference from the facts was that the attachment of the article there in question to the freehold was such as to constitute it a fixture. In that case the article annexed was

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(1) [1897] 1 Ch. 182.

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the subject of a hire-purchase agreement, so the existence of such an agreement is a common element in both cases. The ground upon which that case was decided appears to be that, where there is such an attachment to the freehold as existed in the present case, it primâ facie constitutes the article so attached a fixture; it gives rise to a presumption that the article is part of the freehold, though that presumption may possibly be rebutted by particular circumstances such as to take the case out of the category to which primâ facie it belongs. The principle is well explained by Blackburn J. in delivering the judgment of the Exchequer Chamber in *Holland* v. *Hodgson*. (1) He says: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." The rule so laid down appears to have been acted upon in *Hobson* v. *Gorringe*. (2) Therefore we have it on authority that an attachment to the land similar to that which existed in the present case primâ facie constitutes an article a fixture, and the onus is thereby cast upon the plaintiff of shewing that this machinery had not become a fixture. Consequently, if there was no evidence forthcoming to rebut the primâ facie presumption which arose from the fact of the machinery being so attached to the premises, the plaintiff must fail, and there was no question for the jury. Then, was there any such evidence in this case? That was really the main point argued before us. It was argued that, the terms of the hire-purchase agreement involving a right on the part of the plaintiff in the event of default in payment of the instalments to resume possession of the machinery, that agreement shewed that the attachment of the machinery to the freehold

(1) L. R. 7 C. P. 328.

(2) [1897] 1 Ch. 182.

was not intended to be permanent, but was always to be subject to the right of the plaintiff to resume possession of the machinery; and that the agreement was therefore evidence upon which the jury might find that the machinery had not become a fixture but remained a mere movable chattel.

The question as to the effect of a hire-purchase agreement in such a case as this was considered in *Hobson* v. *Gorringe* (1), and it was distinctly laid down by A. L. Smith L.J. in delivering the judgment of the Court that the hire-purchase agreement could not be regarded as an element in determining the question with what intention an article was annexed to the freehold. He said: "Now, in *Holland* v. *Hodgson* (2), Lord Blackburn, when dealing with 'the circumstances to shew intention,' was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to to shew his meaning. He takes as instances (*a*) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (*b*) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to shew intention is the degree and object of the annexation which is in itself apparent and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded." Again, in the case of *In re De Falbe* (3), Vaughan Williams L.J. said: "In dealing with the question of fixtures it sometimes becomes material to consider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed

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(1) [1897] 1 Ch. 182.

(2) L. R. 7 C. P. 328.

(3) [1901] 1 Ch. 523.

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them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case." Therefore the facts with regard to the hire-purchase agreement do not appear to be any evidence to rebut the presumption arising from such an annexation to the freehold as there was in the present case. That being so, there does not appear to be any evidence in the case to rebut that presumption. The fact that the person who affixed this machinery did so for the purposes of a manufactory on premises of which he himself was the owner for a term of ninety-nine years affords no evidence in support of the view that the annexation was intended to be only temporary for the better use of the machines as mere chattels; on the contrary, it is rather in favour of the view that the intention was that they should be attached to the factory, and be used as part of it, for the purposes of the business there carried on, as long as that business should continue to be carried on. Having regard to the authorities as to the effect of such an attachment to the premises as existed in the case of this machinery, I think that there was no evidence to rebut the presumption which by law primâ facie arises from the fact of such an attachment. I was unable to gather from the argument of the plaintiff's counsel that there was any other fact by reason of which they contended the case ought to have gone to the jury than the existence of the hire-purchase agreement, which I have already shewn not to constitute an element in the determination of the question. Under these circumstances it appears to me that, upon the authority of *Hobson* v. *Gorringe* (1), which is exactly on all fours with this case with the exception that there the mortgagor was owner in fee, whereas here the mortgagor was a lessee for ninety-nine years, a distinction which makes no real difference, the learned judge was right in withdrawing the case from the jury.

The second point raised in this case was also dealt with in *Hobson* v. *Gorringe*. (1) It was there contended, as it was here, that the case of *Gough* v. *Wood & Co.* (2) decided that in such a case as this the plaintiff had a better right than the

(1) [1897] 1 Ch. 182.

(2) [1894] 1 Q. B. 713.

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mortgagee. In that case it was contended that the fact that the mortgagee had stood by, and allowed the mortgagor to remain in possession and to carry on a trade on the premises, involved the conclusion that he had licensed the mortgagor for the purpose of that trade to enter into a hire-purchase agreement; and it was held that, the person who had let the goods under the hire-purchase agreement having intervened, and resumed possession of the goods, before the mortgagee had entered into possession of the premises, the latter could not assert a title to the goods against him. The judgments in that case however expressly leave the point open whether the fixtures could be removed in a case where the mortgagee had previously taken possession of the premises. That point arose in *Hobson* v. *Gorringe* (1), and was there decided adversely to the person who had let the machine. There the plaintiff claimed to be entitled to remove the machine after the defendant, the mortgagee, had entered into possession of the premises; and it was held that he was not so entitled; and the case was distinguished from *Gough* v. *Wood & Co.* (2) on the same ground as that on which this case may likewise be distinguished, namely, that the mortgagee had entered into possession before the plaintiff sought to resume possession of the machine.

I should perhaps observe that it is clear law that, though a fixture may be removable as between landlord and tenant, or as between tenant for life and remainderman, being attached so and under such circumstances as to shew it to be a fixture in that sense only, and not so as to make it permanently part of the freehold, yet it nevertheless will form part of the property subject to a mortgage of the premises, and a mortgagor cannot remove it as against a mortgagee. That point was decided in *Climie* v. *Wood* (3), which was approved of in *Holland* v. *Hodgson.* (4) The plaintiff's counsel, knowing that it would be of no use to contend that these machines came within the description of trade fixtures, contended, as I have already said, that, though attached to the premises, they remained mere movable chattels, and, in support of that contention, they

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(1) [1897] 1 Ch. 182.

(2) [1894] 1 Q. B. 713.

(3) L. R. 3 Ex. 257; 4 Ex. 328.

(4) L. R. 7 C. P. 328.

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referred to the decision in *In re De Falbe* (1), affirmed in *Leigh* v. *Taylor.* (2) But, when that decision comes to be looked at, it appears to me to decide, not that the tapestries there in question remained mere movable chattels, but that they were fixtures in the sense which I have mentioned, namely, things which, though attached to the freehold, were removable as between a tenant for life and a remainderman. From the observations made by Rigby L.J. in delivering judgment, as reported on pp. 533, 535 of the report in the *Law Reports*, I gather that he disposed of the case on the footing that the tapestries, though fixtures, were "ornamental fixtures," which were removable as between tenant for life and remainderman. The observations of Vaughan Williams L.J. and Stirling L.J. at pp. 535 and 538, 540 are to the same effect. The judgments of the learned Law Lords in the House of Lords, where the decision of the Court of Appeal was affirmed, appear to me in effect to treat the case on the same footing. Though far from denying that in some cases there may be a question for the jury, I think that, upon the authorities, and in the absence of any evidence to rebut the primâ facie presumption arising from the annexation of this machinery to the premises, the learned judge was right in dealing with the case as he did, and deciding in favour of the defendants.

The case of *Chidley* v. *West Ham Churchwardens* (3) gives rise at first sight to some difficulty. I asked the plaintiff's counsel whether they could produce any case since *Hellawell* v. *Eastwood* (4) where chattels annexed to the freehold as this machinery was had been held to be mere movable chattels and not fixtures, pointing out that, though the general principle laid down in that case had been approved of in subsequent cases, those cases had been distinguished on the facts, and the conclusion of fact in *Hellawell* v. *Eastwood* (4) had not been approved of in them. In answer to my question counsel cited the case of *Chidley* v. *West Ham Churchwardens.* (3) That was a rating case. It was commented upon by the Court of Appeal in the case of *Tyne Boiler Works Co.* v. *Longbenton*

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(1) [1901] 1 Ch. 523.
(2) [1902] A. C. 157.
(3) 32 L. T. 486.
(4) 6 Ex. 295.

Overseers (1), and, if it is to be supported, it must be, I think, on the grounds on which it was there distinguished, namely, that the matters in question in that case had been rated, not as enhancing the value of the realty, but as personal chattels. The Court of Appeal seem to have thought that machines such as these would pass by a demise of the premises. If so, that would seem to dispose of the present case. For these reasons I think the application must be dismissed.

Romer L.J. I am of the same opinion. In the first place I think, having regard to all the circumstances of the case, including the fact that the mortgagor was the owner of the premises for a term of ninety-nine years, that these machines had, as between mortgagor and mortgagee, become fixtures, which no doubt were in the nature of trade fixtures, but were still fixtures, and so formed part of the mortgage security. I also agree in thinking that upon the facts the jury could not properly have found that the machines were not fixtures, and therefore the judge was right in ruling that they were, and not leaving any question to the jury. The authorities, which shew that in a case like this, as between a mortgagor and mortgagee, machines fixed as these were become fixtures, are far too strong to be now questioned. The only case in the series of authorities which throws any doubt on the matter is that of *Chidley* v. *West Ham Churchwardens*. (2) That case was fully, and so far as we are concerned finally, dealt with by the Court of Appeal in *Tyne Boiler Works Co.* v. *Longbenton Overseers* (1), where it was pointed out that the decision there must be regarded as depending on special circumstances such as are not material for us in the present case to consider, and cannot be looked upon as an authority that machines affixed in the manner and circumstances in which these machines were affixed would not pass by a demise or mortgage of the premises. Putting aside that case, there is a long series of uniform authorities in favour of holding these machines to be fixtures, from which in my opinion we ought not to depart. With regard to the absence of title in the mortgagor as between himself and the plaintiff,

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(1) 18 Q. B. D. 81.

(2) 32 L. T. 486.

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Romer L.J.

I may observe that the mortgagee was not affected with any notice of the rights of the plaintiff, or for any other reason prevented from claiming these fixtures, which he found forming part of the premises when he entered into possession; and, though the mortgagor knew of the plaintiff's rights, he may well have thought, when the goods were affixed, that he would be able duly to pay for them, and so acquire a good title, and so there was no objection to making them part of the premises subject to the right of the plaintiff to remove them if default in payment for them occurred. It may be that, until the mortgagee takes possession of the premises, there is an implied licence by him to the mortgagor in the ordinary course of business to remove or change machinery affixed to the premises, and that that licence would as between the plaintiff and the mortgagee have entitled the plaintiff to assert his right to the machines before the mortgagee entered into possession; but any such implied licence would cease, I think, when possession was taken by the mortgagee. I cannot see my way to infer any licence which would then entitle the plaintiff to remove these machines. The mortgagee does not, by allowing the mortgagor to remain in possession, and carry on business on the premises, affect himself with notice of the contracts which the mortgagor may make with regard to chattels affixed to the premises, or of the nature of the mortgagor's title to such chattels. The plaintiff had no rights conferred on him by the mortgagor which could affect the land as against the mortgagee on taking possession of the premises. It would be very dangerous if anything like a general authority to the mortgagor to deal with or affect the mortgaged property could be implied from the mere fact that the mortgagee has not taken possession of it. There is no fact which can be put forward in the present case to affect the title of the mortgagee beyond the mere fact that he had not taken possession of the premises when these machines were fixed. Any difficulty, if such there be, which may arise from the terms of the contract between the plaintiff and the mortgagor as to these machines was fully dealt with in the case of *Hobson* v. *Gorringe* (1), and the reasoning of the judgment in that case is applicable to the present case, and is binding on us. It is suggested that the result involves great hardship to the plaintiff. Assuming that to be so, it is no answer to the defendants' case. I should like, however, to point out how important it is that the law with regard to fixtures as between mortgagor and mortgagee hitherto regarded as settled should not now be departed from; and further I should like to point out that it might be very injurious to mortgagors engaged in trade, and even to persons dealing with them, if a mortgagor could not borrow money on a long leasehold security, including what are primâ facie trade fixtures, without that security being unimpeachable as regards the fixtures on the ground of its being a bill of sale.

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(1) [1897] 1 Ch. 182.

MATHEW L.J. I am of the same opinion. In determining cases of this kind the attention of the Court must, according to the authorities, be directed to two matters, the first being the mode of attachment to the freehold, and the second being the purpose of that attachment. In the present case it appears to me impossible, as regards the mode of attachment, to doubt that it was sufficient to constitute these machines fixtures. Then, with regard to the purpose for which they were attached, was it merely for the more convenient use of them as chattels, or was it for the better enjoyment of, and to enhance the value of, the premises as a factory? I think that all the circumstances point to the conclusion that these machines were affixed for the purpose of enhancing the value of the premises, of which the mortgagor was the owner for a term of ninety-nine years, and so practically in as good a position as an owner in fee, and not merely for the purpose of their more convenient use as chattels. Therefore, having regard to both the considerations which I have mentioned, I think the evidence shewed that these machines were fixtures, and, consequently, in accordance with the ordinary rule, they passed to the mortgagee. The case of *Chidley* v. *West Ham Churchwardens* (1) is an instance of the inflexibility of a special case. It was there pointed out by Blackburn J. that the question which it was probably intended to raise by the special case was not really raised, and that the only question left to the Court was whether the machines could be separately rated as movable chattels, not whether, as annexed, they would enhance the rateable value of the premises. It does not seem to me that that case assists the plaintiff's contention.

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(1) 32 L. T. 486.

Application dismissed.

Solicitors for plaintiff: *Scott, Spalding & Bell.*
Solicitor for defendants: *T. H. E. Foord.*

E. L.

C. A.
1902
Nov. 10.

[IN THE COURT OF APPEAL.]

DU PASQUIER *v.* CADBURY, JONES & CO., LIMITED.

Practice—Costs—Detinue—Action founded on Tort—Return during Progress of Case of Articles claimed—Rights of Parties at Date of Writ—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-s.* 2.

The plaintiff brought an action in the High Court to recover from the defendants certain drawings that had been deposited with them as agents for sale, and damages for their detention, and he claimed also an account in respect of such of the drawings as had been sold, and the amount that might be proved to be due on the taking of the account. The defendants pleaded that they had always been ready and willing to return the drawings in their possession, and offered to return them forthwith on obtaining a proper receipt. The plaintiff replied accepting the offer to return the drawings, and they were accordingly returned to him. They were of the value of 20*l.* and upwards. The action went to trial on the question of the amount due from the defendants in respect of the drawings that had been sold, and resulted in a verdict for the plaintiff for 33*l.* :—

Held, that the plaintiff was entitled to costs on the High Court scale on the grounds (1.) that he had recovered the drawings through the exigency of the writ, and that the return of them during the progress of the case did not affect the rights of the parties at the date of the writ; and (2.) that, the action being one of detinue in which the plaintiff had recovered the things claimed in specie, it was not within the class of actions founded on tort to which s. 116, sub-s. 2, of the County Courts Act, 1888, applies.

APPEAL from an order of a judge at chambers referring back to a master the taxation of the costs for which the plaintiff had obtained judgment.

The action was brought by the plaintiff as executor of W. J. Ferguson, deceased.

The statement of claim alleged that Ferguson, who was an artist, had entrusted certain drawings, particulars of which were given, shewing them to be of over 20*l*. in value, to the defendants for exhibition and sale as his agents; and that the defendants had illegally detained them from the plaintiff and refused to return them to him on demand; and further that the defendants had refused to account to the plaintiff for any sums of money received by them in respect of any sales of the drawings. The plaintiff therefore claimed an account of the drawings sold or otherwise dealt with, and payment of the proceeds of all sales effected by the defendants; a return of the drawings, or such of them as were still in the defendants' possession, or their value; and damages for the improper detention of the drawings.

The defendants in their statement of defence admitted that they had sold some of the drawings for a sum of 33*l*., and as to the remainder they pleaded: "The defendants have always been and still are ready and willing to return the remainder of the said drawings, and hereby offer to return the same forthwith on obtaining a proper receipt therefor." The defendants further denied the illegal detention, and claimed by way of set-off and counter-claim a sum of money for mounts and frames supplied for the drawings at the request of Ferguson, and brought the balance of the 33*l*. into court as sufficient to satisfy the plaintiff's claim in that respect. The plaintiff in his reply said that he was willing to accept the sum of 33*l*. in part satisfaction of the cause of action, and he accepted the money paid into court in part discharge thereof; but he denied the right of the defendants to the sum claimed in their counter-claim. The plaintiff also replied that he accepted the offer of the defendants to return the remainder of the drawings in satisfaction of the remainder of the cause of action. The drawings were accordingly handed over to the plaintiff, and the action proceeded to trial as to the balance of the plaintiff's claim and the counter-claim. At the trial the defendants offered no evidence in support of their counter-claim, and judgment was given for the plaintiff for 33*l.* and costs, and also for the plaintiff upon the counter-claim with costs.

Upon taxation the master taxed the plaintiff's costs upon the High Court scale, upon the ground that the action was founded on tort within the meaning of s. 116 of the County Courts Act, 1888. Upon appeal, Bucknill J. allowed the objection raised by the defendants to the taxation on the ground that the plaintiff had recovered judgment for 33*l.* in an action founded on contract, and was not entitled to have his costs taxed on the High Court scale, and made an order referring the matter back to the master for taxation.

The plaintiff appealed.

Macoun, for the plaintiff. The action was one of detinue, and it has not been converted into an action of tort by the admission of the defendants that they were willing to give up the drawings and the acceptance of them by the plaintiff upon that admission. The action was for the return of the drawings, and, that being so, it is an action founded on tort: *Bryant* v. *Herbert*. (1) No question has been raised as to the value of the drawings detained not being much more than 20*l.*; so that, even without taking into consideration the 33*l.* recovered by judgment, the plaintiff is entitled to costs on the High Court scale. [He cited *Turner* v. *Stallibrass* (2) and *Sachs* v. *Henderson*. (3)]

Hansell, for the defendants. In ascertaining what has been recovered in an action, the time to be looked at is the time when the plaintiff recovers judgment: *Solomon* v. *Mulliner*. (4) In the present case the plaintiff has only recovered in the action, as money received to his use, the sum of 33*l.*, the price of the drawings sold by the defendants. There has, therefore, been a claim founded on contract and recovery under that claim. The claim in detinue was not before the judge at the trial. The defendants said they were always willing to return the drawings; and the plaintiff in effect admitted that fact, and thereupon he received the drawings, and all claim in detinue was disposed of. Apart from that, the action is really one founded on a breach of contract to redeliver the drawings, and for money had and received and for an account; and in that action all that the plaintiff has recovered is 33*l.*, and he is only entitled to costs on the county court scale.

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(1) (1878) 3 C. P. D. 389.

(2) [1898] 1 Q. B. 56.

(3) [1902] 1 K. B. 612.

(4) [1901] 1 K. B. 76, at p. 83.

Collins M.R. I am of opinion that this appeal should be allowed. From two points of view the plaintiff's contention that he is entitled to costs upon the higher scale is right. In the first place he says that, having regard to what happened, he has recovered in an action founded on tort a sum not less than 20*l.* I think that it is made out that this action is founded on tort. The statement of claim shews that the plaintiff is suing in respect of the wrongful detention of certain drawings, and claiming their return and damages for their detention. So far it is clear that the action is for a tort; but the statement of claim further asks for an account of all moneys received by the defendants on the sale of some of the drawings, and for the recovery of the amount found to be due thereon. The addition of such a claim does not affect the nature of the antecedent claim. Six weeks after the starting of the action the defendants pleaded that they were always ready and willing to return the pictures in their possession, and in effect made an offer to return them, and that offer the plaintiff accepted. It has been argued that the plaintiff has recovered the drawings as much through the exigency of the writ as if the action had been fought out to an end, and with that view I agree. It was conceded that the value of the drawings was far above 20*l.* I do not think that it is open to the defendants at this stage of the case to contend that if all the facts had been brought out at the trial something more might have been shewn than is raised by the statement of claim, namely, a contract to return the pictures, and a breach of that contract for which the action was brought. Nor do I think that the arrangement come to at a later stage for the return of the drawings can interfere with the rights of the parties at the date of the writ.

There is a further ground for a decision in favour of the appellant, which is made good by the case of *Keates* v.

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Collins M.R.

Woodward (1), decided in this Court. In the present case the plaintiff has recovered the drawings; and if they had not been returned and the action had gone on in respect of them, he would have been entitled to have them returned and to nominal damages for their detention. In *Keates* v. *Woodward* (1) the plaintiff recovered nominal damages and an injunction, and it was held that the action was not one of the class embraced in the provision of s. 116, sub-s. 2, of the County Courts Act, 1888, as to the recovery of damages in an action founded on tort. In that case *Bradley* v. *Archibald* (2), a decision of the Irish Queen's Bench Division, was approved and followed. There the return of certain promissory notes was claimed in the action, and they were handed over during the course of the case, and a small sum was given as damages. The value of the notes was not determined by the jury, and was treated by the Court as nominal, and it was held that, as they had been recovered in specie, the case did not come within the rule as to costs in an action of tort. On the principle laid down in that case and adopted in *Keates* v. *Woodward* (1), the recovery of the drawings under the exigency of the writ takes this case out of the rule.

I think for these reasons that the plaintiff was entitled to costs on the higher scale, and that the appeal must be allowed.

Mathew L.J. The action before us was not one brought merely to recover money, and in which only money was recovered. The plaintiff's principal claim was for the recovery of certain pictures, and no question has been raised as to their value. As to what happened with regard to these pictures, it was said for the defendants that there could be no dispute that they were always ready and willing to return them, and reference was made to the pleadings. The pleadings, however, do not support this contention, for there is a condition attached to the statement as to the willingness to return these pictures. Under these circumstances the defendants cannot rely on the delivery up of the pictures during the course of the case. I

(1) [1902] 1 K. B. 532.

(2) [1899] 2 I. R. 108.

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quite agree that the decision in *Keates* v. *Woodward* (1) is an authority entirely in point in the present case, and that the appeal must consequently be allowed.

Appeal allowed.

Solicitor for plaintiff: *J. B. Edwards.*
Solicitor for defendants: *H. H. Fanshawe.*

A. M.

DE HART *v.* COMPAÑIA ANONIMA DE SEGUROS "AURORA."

1902
Oct. 31.

Marine Insurance—"General Average payable according to Foreign Statement"—Special Provision in Charterparty as to General Average—Foreign Law.

The plaintiff, a shipowner, effected with underwriters a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up." The plaintiff chartered the ship to third persons, and by the terms of the charterparty it was provided that the ship might carry a deckload of timber, and that "In case of average .... jettison of deck cargo for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deckload, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was there made up, and the average adjuster, in accordance with the terms of the charterparty, included the jettison of deck cargo in general average. By the Belgian law, apart from any special provisions in the charterparty, the jettison of deck cargo would not be the subject of general average:—

Held, that, assuming that under the words "general average payable according to foreign statement" the underwriters did not intend to be bound by the foreign statement unless it was made up in accordance with the law of the foreign country—a question which the judge held it unnecessary to decide,—the statement was in accordance with the Belgian law, inasmuch as that law recognised the express provisions of the charterparty, and that the underwriters were bound to indemnify the plaintiff against the ship's proportion of the loss on the jettison of the deck cargo.

TRIAL OF ACTION before Kennedy J. without a jury.

The plaintiff, who is the owner of the SS. *Henriette H.*, effected with the defendants, who are underwriters, two policies of insurance upon the said ship for twelve months, the one from August 28, 1900, to August 28, 1901, and the other from September 7, 1900, to September 6, 1901. Each of the policies contained the clause, "General average payable according to foreign statement if so made up, or York-Antwerp Rules if in accordance with contract of affreightment," and (attached to the policy) the clauses known as the Institute Time Clauses, 1900, which include the following clause: "General average and salvage charges payable according to foreign statement, or per York-Antwerp Rules if in accordance with the contract of affreightment." By a charterparty dated October 11, 1900, made between the plaintiff and Messrs. Baars, Dunwody & Co., it was agreed that the *Henriette H.* should carry a cargo of pinewood, including a deckload (if required by the master) from Pensacola to Antwerp. It is the regular and usual course of trading for vessels from Gulf timber ports to carry deckloads of timber to Continental ports. The charterparty contained the following clause: "In case of average the same to be settled according to York-Antwerp Rules, 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." The *Henriette H.* sailed from Pensacola on November 29, 1900, carrying a deckload, and on the voyage she suffered damage, and it became necessary for the safety of the ship and her cargo, in consequence of perils insured against, to jettison part of the deckload. The remainder of the cargo was delivered at Antwerp. In due course an average statement was prepared at that port, and the average stater included the deck cargo jettisoned and its freight as general average. It was admitted that by Belgian law, apart from any special provision in the charterparty, the jettison of the deck cargo and the freight thereon would not be the subject of general average.

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(1) [1902] 1 K. B. 532.

The question in issue between the parties was whether under the policy the defendants were liable to pay to the plaintiff a proportionate part of the ship's proportion of the loss on the jettison of the deck cargo.

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Carver, *K.C.*, and *De Hart*, for the plaintiff. The average statement made up at Antwerp was a "foreign statement" within the meaning of the policy. Even if those words mean a statement made up in accordance with the law of that country, the statement here was in accordance with the law of Belgium, for it cannot be disputed that the law of that country will recognise the special provisions of the contract of affreightment, and will for the purposes of the particular case treat as the subject of general average that which the parties to that contract have agreed shall be so treated. But, further, even if the average statement here is not in any sense in accordance with the law of Belgium, the defendants are nevertheless bound by it, for the words "foreign statement" mean nothing more than a statement made up in a foreign country, and the parties must be taken to have agreed to treat the foreign average adjuster as an arbitrator, and to be bound by the statement whether in accordance with the law of the country where made up or not. This was the view adopted by Bovill C.J. and Keating J. as to the meaning of that term in *Harris* v. *Scaramanga*. (1)

J. A. Hamilton, *K.C.*, and *J. R. Atkin*, for the defendants. The statement of the foreign average adjuster is not intended to be conclusive unless it is made in conformity with the foreign law. This was the construction put upon the words "general average as per foreign statement" in *Mavro* v. *Ocean Marine Insurance Co.* (2) There the adjustment was made at Constantinople, by the law of which port the adjustment ought to be made according to the law of France. Blackburn J. there said: "I construe the words 'general average as per foreign statement' to mean that general average in the policy shall include such losses as the French law regards as intentional sacrifices made for the benefit of the whole adventure, not only such losses as a foreign average adjuster shall actually state." And Cockburn C.J. said: "What is general average is to be determined by the law of the foreign place to which the ship is bound." The case of *Harris* v. *Scaramanga* (1) has been explained in *Hendricks* v. *Australasian Insurance*

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(1) (1872) L. R. 7 C. P. 481, at p. 489.

(2) (1875) L. R. 10 C. P. 414.

1902

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Co. (1), where Lord Coleridge and Brett J. treated the judgment of Brett J. in the former case as being the judgment of the Court, and the case as having decided that "upon such a policy English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made." And in *The Brigella* (2) Gorell Barnes J. takes the same view of *Harris* v. *Scaramanga.* (3) But if the statement to be binding on the defendants must be in accordance with the foreign law, by that term must be understood the general law of the land—in in this case the Belgian Code—and not the general law coupled with special provisions contained in a contract to which the defendants were not parties. Underwriters may well agree to be bound by a statement made up in accordance with a code the provisions of which they either know or have the means of knowing, but it would be unreasonable to suppose that they intended to leave it in the power of the assured to enlarge their (the underwriters') liability by the provisions that the shipowners might thereafter, in consideration possibly of an increased freight, insert in a contract of affreightment.

Carver, K.C., in reply.

KENNEDY J. In this case a point has been raised which is evidently thought to be of importance from a business point of view, but it is one about which I should have thought there could be no reasonable doubt. The plaintiff claims from the defendants an indemnity against a contribution that he had to make in general average, and the question of the defendants' liability turns upon the construction to be put on a clause in the policy: "General average payable according to foreign statement if so made up." It is not necessary for me here to decide whether, when the parties to a contract of insurance use the words "general average payable according to foreign statement," they mean that it is to be payable according to foreign statement if that statement is correctly made in accordance with the foreign law, or whether they mean, as was suggested

(1) (1874) L. R. 9 C. P. 460.
(2) [1893] P. 189, at p. 199.
(3) L. R. 7 C. P. 481.

by Bovill C.J. when delivering the judgment of himself and Keating J. in *Harris* v. *Scaramanga* (1), that if a question arises as to whether or not there was a claim for general average for which the underwriter was liable it was by the express agreement of the parties a question to be determined by the foreign adjustment. In the view which I take of this case I need not decide that question, and I will assume for the purposes of my judgment that the parties intended the foreign statement to be binding only if made in accordance with the law of Belgium. The objection raised by the defendants to the adjustment being valid and effective against them is that that adjustment admits as the subject of general average that which would not be admitted by the law of Belgium apart from any special contract between the parties to the contract of affreightment. But the fact that the average adjuster took that special contract into consideration does not prevent his statement from being a statement in accordance with Belgian law. The law of the foreign country—in this case Belgium—recognises in regard to general average the terms of any special contract of affreightment that the parties may have chosen to make. The foreign statement is here correctly made having regard to that special contract, which is recognised by the law of Belgium, and it seems to me, therefore, that by that foreign statement the underwriters are bound. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-upon-Tyne.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

J. F. C.

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(1) L. R. 7 C. P. 481.

1902
Aug. 2;
Nov. 19.

ROWSON *v.* ATLANTIC TRANSPORT COMPANY.

Shipping—Bill of Lading—Harter Act (Act of Congress of U.S.A. 1893)—
"*Faults or Errors in Management of Vessel.*"

Butter was shipped on board the defendants' ship at New York for carriage to London under bills of lading which incorporated the Act of Congress known as the "Harter Act," by s. 3 of which it is provided that, subject to the conditions therein named, the owner of the ship shall not be "held responsible for damage or loss resulting from faults or errors . . . . in the management of said vessel." The butter was carried in insulated chambers connected with refrigerating machinery. It was delivered in London in a damaged condition, resulting from the negligence of the crew in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high:—

Held, that the neglect to keep the chambers sufficiently cooled during the voyage was a fault or error "in the management of" the "vessel" within the meaning of the bills of lading, and that the defendants were consequently excused.

Trial before Kennedy J. without a jury.

Certain parcels of butter in tubs and boxes were shipped at New York on board the defendants' ship *Minneapolis* under two bills of lading dated June 29, 1900, for carriage to London. By the bills of lading it was agreed that the shipment should be "subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act relating to Navigation of Vessels, &c.,'" commonly known as the Harter Act. By s. 3 of that Act it is provided, "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." The butter, which was sound when shipped at New York, was delivered in London to the plaintiff, the indorsee of the bills of lading, in a damaged condition. It was carried in certain insulated chambers connected with the refrigerating apparatus with which the ship was supplied for the purpose of enabling her to carry perishable goods during the summer months. At the time of the shipment these chambers were cooled down to a proper temperature for the reception of the butter, and the refrigerating machinery was in good working order. The damage to the butter was caused by the negligence of the crew in the management of the refrigerating apparatus during the voyage, whereby the chambers were not kept at a sufficiently low temperature. It was contended on behalf of the defendants that the negligence in the management of the refrigerating apparatus was a fault or error in the management of the vessel within the meaning of the Harter Act.

J. A. Hamilton, K.C., and *Loehnis*, for the plaintiff.
Robson, K.C., and *D. Stephens*, for the defendants.

Cur. adv. vult.

Nov. 19. KENNEDY J. The question which I have to decide in this case turns upon the proper construction to be put upon s. 3 of the Harter Act, which provides that if the owner of the vessel "shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped, and supplied," he shall not be held responsible "for damage or loss resulting from faults or errors in navigation or in the management of said vessel." That Act gives protection only upon condition of the ship being seaworthy. Now a vessel, which has to carry cargo which can only be safely carried if its refrigerating machinery is in proper order, is one which at the present day, according to a series of decisions both in this country and in America, cannot properly be regarded as seaworthy unless it has that machinery in proper order. The term seaworthiness is one which was originally, no doubt, used in days when refrigerating apparatus and other modern appliances for the safe carriage of cargo were unknown. In a sense it is obviously not a happy term to use except with regard to that condition of the vessel which enables the owner to avoid exposure of the cargo to the perils of the sea. But the more extended use of the term has come to be well recognised. In the American case of *The Thames* (1), in the course of the judgment of the Court it is said: "A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship and carried on a voyage, the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy quoad that article, and if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the non sequitur that it is capable of carrying safely and without damage some other article of a different character." The same view as to unseaworthiness was taken by the Court of Appeal in *Owners of Cargo on Ship Maori King* v. *Hughes* (2), where it was held that on a shipment of a cargo of frozen meat for carriage from Australia to London there was an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat to its destination. And Kay L.J. there observed: "The real inquiry, as it seems to me, would be, not as to the 'unseaworthiness' of the ship properly so called, but whether the ship was, at the time when the goods were shipped, provided with proper appliances to enable her to carry these goods in their hard frozen condition, and deliver them in that condition at the end of the voyage." In view of these authorities, it is to my mind clear that the word "seaworthy" in the section of the Harter Act which is embodied in the bills of lading before me means fit to carry the particular cargo safely in respect of the dangers which but for proper fittings and equipment might damage it during the carriage.

In the present case, upon the evidence before me, I am satisfied, not only that the owners exercised due diligence to make the ship seaworthy in that wide sense, but that she was in fact in all respects seaworthy and properly manned, equipped, and supplied, and that the condition of the section was consequently satisfied.

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(1) (1894) 61 Fed. Rep. 1014.

(2) [1895] 2 Q. B. 550.

But, if the condition of the section would not be satisfied, and if the ship would be unseaworthy at the time of the shipment, unless she was fitted with proper refrigerating machinery to keep the butter cool, then if during the course of the voyage she is rendered unseaworthy in respect of the safe carriage of the butter by the negligence of those in charge of the refrigerating machinery, I cannot escape from the logical conclusion that this negligence is, within the meaning of the Harter Act, negligence in the management of the ship of which that machinery is a part. This seems to be in accordance with the language of Gorell Barnes J. in *The Rodney* (1), where he says: "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship as a ship, which affects the safety of the cargo." There must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Holman, Birdwood & Co.*

J. F. C.

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(1) [1900] P. 112, at p. 117.

1902
July 22, 23, 24, 25, 26;
Aug. 7.

GLAMORGAN COAL COMPANY, LIMITED, AND OTHERS *v.* SOUTH WALES MINERS' FEDERATION AND OTHERS.

Action, Cause of—Inducing Breach of Contract—Bonâ fide Advice—Conspiracy—Intent to Injure.

A person who on being asked gives honest and bonâ fide advice to another which induces him to break a contract of service with a third person is not liable to an action at the suit of that third person, even though he has sustained damage by the breach of the contract; and the same is the case where several persons have combined to give the advice, if they have no malicious intention to injure the third person.

ACTION tried before Bigham J.

The action was brought by seventy-four firms and companies, who were the owners of collieries in South Wales, against the South Wales Miners' Federation and its executive officers to recover damages for having maliciously and fraudulently procured certain workmen of the plaintiffs to break their contracts of service.

The following statement of the facts is taken from the written judgment of Bigham J.:—

The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. The defendants are first the men's federation, a body registered under the Friendly Societies Acts; secondly the trustees of the federation; thirdly Mr. Brace, the vice-president, Mr. Onions, the treasurer, and Mr. Richards, the secretary of the federation; and lastly six men, who are members of the executive council of the federation, and who are also members of workmen's half of a body known as the joint sliding scale committee, to which I shall have to refer later on. The trustees are joined as defendants merely in order to enable the plaintiffs to reach the funds of the federation in the event of a judgment being recovered for damages against that body. It appears that for the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement called the sliding scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal: that is to say, as the price of such coal rises or falls, so the rate of wages moves up or down. It is thus to the interest, not only of the masters, but also of the men, to keep up the price of coal; but at the same time not to drive it up to such a point as will unduly interfere with the demand. Against the producers of coal there are always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of these men is, of course, to keep down prices, so that they may buy as cheaply as possible. They frequently sell large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which will make their bargains remunerative. This has the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men have tried together to devise some scheme to so regulate the output of the mines, by means of stop-days or otherwise, as to counteract this effect. There has, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing has been done. On April 1, 1898, a strike broke out in the South Wales district, and the collieries were closed from that date to August 31. On September 1 work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that a joint committee of masters and men should be formed, which should be called the joint sliding scale committee; and that it should be comprised of twelve members representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of this committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions in addition to the provision for the formation of the joint committee, but it is only necessary to refer to one of them. It is clause 23 of the embodied sliding scale agreement, and it is as follows: "It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month." Although only forty-seven of the plaintiffs were parties to this agreement, and were alone to be represented on the joint sliding scale committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On October 11, 1898, the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They number about 128,000, and they include all, or very nearly all, the men who work for the plaintiffs. The members at once proceeded to elect a president, a vice-president, a treasurer, and a secretary. They also elected an executive council, consisting of twenty-five men, who were to manage the affairs of the federation. The federation was subsequently—namely, in February, 1899—registered under the Friendly Societies Acts. By its rules its objects are declared to be to provide funds to carry on the business of the federation; to take into consideration the question of trade and wages; and to protect workmen generally, and regulate the relations between them and employers; and to call conferences to deal with questions affecting the workmen of a trade wage and legislative character. On November 5, 1898, the executive council met and resolved, "That this council in its entirety shall from time to time transact the whole of the business arising out of the sliding scale agreement, notwithstanding that only twelve of the said council can appear before the employers to deal with the sliding scale joint committee," and, having passed this resolution, they then proceeded to elect twelve of their own body to serve on the joint committee. The forty-seven plaintiff companies objected to this election upon the ground that the council represented all the miners in South Wales, whereas the joint committee was to be composed only of the representatives of the forty-seven firms, and of the men who worked for those firms. Thereupon another election was held, at which only the men in the collieries of the forty-seven firms voted. They, however, chose the same twelve men as had been chosen by the executive council, so that the masters took nothing by their objection. The effect of this was, in my opinion, that the twelve working-men who formed the working-men's half of the joint sliding scale committee became the mere mouthpiece of the federation, and took their instructions from the council of the federation, of which, as I have said, they were all members.

The federation prospered greatly, so that by the end of 1900 it found itself in the possession of funds amounting to 100,000*l*. The price of coals also rose, and with it the rate of wages. But in October or November, 1900, the council of the federation seem to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. It is at this season of the year that foreign Governments and others make their contracts for forward delivery of coal, and the prices at which these contracts were being effected alarmed the council, and foreshadowed a fall in prices. Whether the fear was well founded or not I cannot say, but I am satisfied by the evidence that it was honestly felt. On November 5, 1900, Mr. Abraham, M.P., the president, made a speech at a meeting of the council of the federation, from which I take the following passage: "There is an attempt being made by middlemen and merchants to bring about an undue reduction in the price of coal; 80 per cent. of the employers are trying to counteract this movement, but three or four large firms appear to desire that it should be successful. I therefore suggest that steps be taken to bring about a stop-day throughout the coalfield as a protest against this action." Thereupon a resolution of the council was passed ordering a stop-day for Friday, November 9, and a further resolution was passed, that a general conference of the federation should be convened for November 12. In the meanwhile the following manifesto was ordered to be circulated: "Fellow Workmen. Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organized attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interest of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coalfield by all colliery workmen on Friday next, November 9, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial Hall on Monday next, November 12, 1900, to consider and determine our future policy, as embodied in the following resolution: That the conference hereby authorizes the council to declare a general holiday at any time they think it necessary for the protection of our wages and the industry generally.—W. Abraham." This manifesto had the desired effect, and on November 9 all the colliers in the coalfield, including the men working in the plaintiffs' collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of November 6. This stoppage on November 9 is the first matter of which the plaintiffs complain in this action. On November 12, 1900, the conference which had been convened for that day was held, and at it a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. Having regard to what happened twelve months later, and to the present contentions of the federation, this resolution, which was passed by the conference in compliance with the request of the executive council in their manifesto, is of considerable importance. The representatives of the masters on the joint sliding scale committee were annoyed at the course which the executive council had adopted, and on November 13, 1900, they held a meeting at which the working-men's representatives on the committee were present. The latter assured the masters that the action of the council had not been taken with a view to injuring the owners, nor to interfering with the relations between owners and workmen, but only to shew middlemen that they were not to be allowed to do with the markets what they had done in the past. This assurance the masters accepted, recording their acceptance in a memorandum in the minute-book of the joint sliding scale committee. The memorandum is as follows: "That, whilst accepting the assurances of the workmen's representatives that they thought they were acting for the good of the coal trade in having ordered a general stoppage of work at the collieries on Friday last, the owners' representatives are unanimously of opinion that the principle involved in such a stoppage is unsound, and the action is illegal, and will not achieve the object which the workmen's representatives apparently had in mind, and the owners' representatives protest against the course followed, for, so far from assisting the trade, such action is calculated to damage it, both temporarily and permanently. And, further, the owners' representatives are of opinion that, the stoppage having been in contravention of all established customs at the collieries and so far-reaching in its effects, the general body of the associated owners will have to be consulted upon the course which the workmen have seen fit to adopt." On November 28 the associated owners met, and, after negativing the expediency of prosecuting the men, resolved as follows: "That the owners' side of the sliding scale committee point out to the workmen's representatives that a resolution has been passed by the association that, if the men make any future illegal stoppage the owners will take proceedings against the men." Thus this incident was closed; and, if nothing further had happened, I am satisfied that it would have been forgotten. I wish to say of it that I think the masters were right in accepting the assurances of the men. I am quite satisfied that in ordering the stop-day the federation acted as they thought in the best interests of the men, and without any intention, malicious or otherwise, of injuring the plaintiffs.

I must now deal with the events which led up to the ordering of the other stop-days (in October and November, 1901) of which the plaintiffs complain. It is necessary to consider them with some care, inasmuch as the federation by their counsel allege that they did not order these stop-days, and that they cannot therefore be held responsible for them. In this connection it is to be remembered that on July 22, 1901, the House of Lords had decided in the *Taff Vale Case* (1) that a friendly society could be sued, and its funds reached, to answer any damages that might be recovered against it. On October 12, 1901, the defendant Brace, the vice-president of the federation, made a speech to the miners, in which, after congratulating them on the flourishing position of the federation finances, he insisted that unless some steps were taken to prevent the depression of prices, which was likely to result from what he called the cut-throat competition in the trade, the workmen's wages would be seriously diminished; and in this connection he referred to the low prices at which contracts for coal had recently been made. He concluded by saying that "if there was the slightest tendency to a slump in prices brought about by unfair competition the executive council of the federation, in whom power was invested by the whole of the workmen, according to the conference resolution, would immediately declare a series of stoppages, with a view to regulating the supply according to the demand." Four days later, on October 16, 1901, Mr. Brace made another speech, in which, referring to his speech of October 12, he intimated that if a stop was ordered it would not be by the federation, but by the workmen themselves. On October 19 Mr. Richards, the secretary of the federation, made a speech to a body of miners, in which, referring to the possibility of a stop-day being ordered, he said that the executive council would have to move carefully, in view of the decision of the House of Lords in the *Taff Vale Case* (1), and that, if any notice of a stop was found necessary for the purpose of keeping up wages, it would come from the sliding scale committee. About the same time, namely, on October 18, 1901, Mr. Onions, the treasurer of the federation, made a speech, in which, after observing upon the comparatively low prices at which some large contracts for coal had recently been made, he stated that some general action would have to be resorted to by the workmen to protect themselves, and that, in the face of the recent decision in the *Taff Vale Case* (1), they would have to exercise great care. "It would be better," he added, "to take some action to save themselves now than to be compelled later on, when wages had been reduced to starvation point, to take drastic measures." These speeches preceded a meeting of the executive council of the federation, which was held on October 23, 1901, and they foreshadowed what was to be done at the meeting. The federation, or its officers, obviously desired that one or more stop-days should be declared, but, having regard to the decision of the *Taff Vale Case* (1), they desired that the order for the stop-days should be issued by some other body than their own: by some body which had no funds with which to answer any judgment that might be recovered in the event of the order turning out to constitute an actionable wrong.

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(1) *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

At the meeting of the executive council held on October 23, 1901, there were twenty-two members present, ten of them being also members of the working-men's division of the joint sliding scale committee. The vice-president, Mr. Brace, and the treasurer, Mr. Onions, were there. Mr. Brace appears to have called attention to several contracts for forward delivery of coal which had been made at many shillings below the average price as ascertained at the last sliding scale audit, and thereupon a discussion ensued as to whether the federation should take steps to counteract the bad effect of these contracts. Then it seems to have been moved that the executive council should not take upon itself the responsibility of declaring any stop-day; and to that an amendment was proposed that, if any stop-days were to be ordered, the orders should be executed by the executive council of the federation, no other body having authority to do so. The amendment being put, only three voted for it, while nineteen voted for the original motion. Thus it stands recorded on the minute-book of the federation that the council of the federation should take no responsibility for ordering stop-days. Immediately after this vote had been taken all the members of the council who were not members of the sliding scale committee left the room, and the remainder, by some process not explained, resolved themselves into the working-men's half of the sliding scale joint committee, and proceeded in that capacity to declare two stop-days—October 25 and 26, 1901—and thereupon the following manifesto was published: "To the workmen employed at the South Wales and Monmouthshire Collieries. It having come to the knowledge of your representatives upon the sliding scale committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and fearing the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next. (Signed) W. Brace, Alfred Onions, Enoch Morel, Thomas Evans, D. Watts Morgan, C. B. Stanton, Thomas Thomas, D. D. Beynon, Daronwy Isaac, Evan Thomas, Thomas Richards." Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop-days had been declared. It is of importance to observe that with many of these collieries the sliding scale committee, as a committee, had no concern; for that committee only represented the forty-seven firms before mentioned, and the working-men's representatives on the committee were elected only by the men working in the collieries of those firms. Yet the committee took upon themselves to do that which the federation alone had authority to do—namely, to order stop-days in all the collieries in South Wales. One other fact: the cost of printing the manifesto and of sending out the telegrams was paid out of the funds of the federation, and the organization of the federation was used for the purpose of making the stop-days known to the men throughout the district. Subsequently two other stop-days were ordered, one for October 31 and one for November 6. They were also declared at meetings of what was called the working-men's half of the sliding scale committee; but, as before, communications to the men were distributed by means of the organization of the federation, and the cost was defrayed out of the federation funds. The result of all this was that the men stayed away from work on the four days, and so broke their contracts with the masters. It was argued on behalf of the federation that they, the federation, could not be held responsible for the consequences of stop-days, for the reason that the federation had expressly refused to meddle in the matter, as appeared by the resolution of October 23. I do not, however, think this argument well founded. It is true that the hand of the working-men's representatives on the sliding scale committee is made to appear as directing these stop-days, but I cannot doubt that the hand was guided and controlled by the federation itself. In truth, it was the federation who were acting, the name of the sliding scale committee being used as a blind—a very transparent blind—to conceal what was being done. The writ was issued on November 22, 1901. After the writ was issued Mr. Evan Thomas, one of the defendants and a prominent official of the federation, speaking at a meeting of miners upon the question as to how the stop-days would affect the right of hauliers to a certain bonus payable to them by the masters, said, "When a stop-day is declared, it is expected that every one will morally abide by it, but if the hauliers do not they are in a sense acting disloyally towards the federation, and it will certainly mean that the executive council will either have to give this policy up or do something else to meet the difficulty of carrying this policy out." It is true that within two or three days of this speech being reported Mr. Evan Thomas wrote to the newspapers to say that he had used the expression "executive council" by a slip, and that he ought to have said sliding scale committee. But, for my part, I think this officer made no slip at all, and that he was quite right when he attributed the stop-day policy to the executive council of the federation. A number of witnesses were called before me on the part of the plaintiffs and on the part of the defendants. Mr. Dalziel, secretary of the plaintiffs' association, stated that he did not suggest that in giving the advice to stop in November, 1900, there was any intention of injuring the masters, and the resolution of the masters passed on November 13 confirms Mr. Dalziel in that view. Then it appears that in October, 1901, circumstances similar to those which led up to the stoppage in 1900 again occurred, and that these circumstances afforded the only reason for ordering the stop-days in October and November, 1901. There was no quarrel at all between the masters and the men, and, so far as I can see, no illwill. The men objected to the course of business adopted by the middlemen, and in this objection some, at least, of the masters seem to have shared. The evidence satisfies me that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop-days. Having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs.

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(1) *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and given. If followed, it involved, as the defendants knew, the breaking of the subsisting contracts. It was followed, as the defendants wished it should be; and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing.

1902

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Rufus Isaacs, K.C., and *S. T. Evans, K.C.* (*Holman Gregory* and *Bailhache* with them), for the defendants. No action will lie against a person who advises another to break a contract unless that advice is given maliciously—that is to say, with the intention of injuring the person with whom the contract has been made: *Lumley* v. *Gye* (1); *Bowen* v. *Hall.* (2) In an American case, *Walker* v. *Cronin* (3), an express exception was made to the rule that it is actionable to induce a breach of contract, in favour of honest advice. *Allen* v. *Flood* (4) and *Quinn* v. *Leathem* (5) lay down the principle in another way, namely, that a violation of a legal right if committed knowingly is actionable, and that it is a violation of a legal right to interfere with contractual relations if there is no sufficient justification for that interference. Here, the defendants gave honest and bonâ fide advice on being asked to do so, and they, therefore, had sufficient justification for their interference. Every case must depend on its own particular circumstances. The right of the defendants here to advise the men was at least equal to that of the plaintiffs to have no interference with their contracts with the workmen: *Read* v. *Friendly Society of Operative Stonemasons.* (6) As to conspiracy, it is not actionable to combine to bring about what is lawful unless the combination intends to bring about a lawful end by unlawful means: *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (7); *Huttley* v. *Simmons* (8); *Gregory* v. *Brunswick* (*Duke*) (9); *Keeble* v. *Hickeringill* (10); *Kearney* v. *Lloyd* (11); *Boots* v. *Grundy.* (12)

Sir Edward Clarke, K.C., and *Francis Williams, K.C.* (*Montague Lush, K.C.*, and *Trevor Lewis* with them), for the plaintiffs. A person who wrongfully or maliciously or knowingly interferes with the relations of master and servant, and procures the servant to depart from the master's service to the injury of the master, commits an actionable wrong. That principle, as laid down by Erle C.J. in *Lumley* v. *Gye* (1), has been expressly approved in *Allen* v. *Flood* (2) and *Quinn* v. *Leathem.* (3) This was not mere advice on the part of the defendants, but it amounted to compulsion; but even a person who gives bonâ fide advice to another to break a contract with a third person may become liable in damages to that third person for the injury which he has caused to him. As to conspiracy, all that was decided in *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (4) was that an action will not lie against persons who have combined for their own commercial advantage to do a lawful act, even if they know that the effect of their combination will be to injure others. Here, the incitement to break the contract was not a lawful act; but even if no law is violated by procuring another to break his contract, yet where there is a combination to procure such a breach of contract the motive of those combining becomes important, and, if to the knowledge of those entering into the combination, the effect of the breach will be to cause injury to others and profit to themselves, the combination is unlawful: *Quinn* v. *Leathem.* (3) An act done by an individual, if it is in itself lawful, cannot become unlawful because it is done with an evil intention: *Allen* v. *Flood* (2); but it is otherwise in the case of a combination of persons, and if they combine to do an act which is lawful in itself, but with the intention of injuring another by doing that act, then, if the act is done and the expected injury results, the combination is liable to an action.

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(1) (1853) 2 E. & B. 216.

(2) (1881) 6 Q. B. D. 333.

(3) (1871) 107 Mass. Rep. 555.

(4) [1898] A. C. 1.

(5) [1901] A. C. 495.

(6) [1902] 2 K. B. 88, 732.

(7) [1892] A. C. 25.

(8) [1898] 1 Q. B. 181.

(9) (1844) 6 M. & G. 953.

(10) (1705) 11 East, 574, n.; 11 R. R. 273, n.

(11) (1890) 26 L. R. Ir. 268.

(12) (1900) 82 L. T. 769.

Cur. adv. vult.

Aug. 7. The following judgment was read by

BIGHAM J. This is an action brought by the Glamorgan Coal Company, Limited, and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their

(1) 2 E. & B. 216.

(2) [1898] A. C. 1.

(3) [1901] A. C. 495.

(4) [1892] A. C. 25.

contracts of service with the plaintiffs. In the alternative, the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The plaintiffs claim both damages and an injunction. The defence consists of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse. The case came on to be tried before me with a special jury on July 22 last, but after the trial had lasted three days the jury was discharged, and all questions of law and fact, as well as the ascertainment of the damages, if any, were by consent left to me. The facts I find as follows: [The learned judge then set out the facts as above, and continued:—] These circumstances, in my opinion, disclose no cause of action.

In all the cases cited to me, where the action has been for damages for procuring the breach of a contract, the element of actual malice—that is to say, a real intention to harm the plaintiff—has been regarded as essential. In *Lumley* v. *Gye* (1) the allegation was that the defendant "maliciously procured" the servant to break her contract, and the judgment rests on the malice so imputed to the defendant. It is true that Crompton J. in that case says that it must be considered clear law that a person who, wrongfully and maliciously, *or, which is the same thing, with notice*, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, whereby the master is injured, commits a tort. If this means that mere notice of the existence of the contract of service raises an irrebuttable presumption of malice, I do not think it is good law. If a brother believes that his sister is in a service which is injurious to her health, cannot he advise her to break her contract without thereby rendering himself liable in tort to the master? In such a case, in my opinion, it would be impossible to say that an action would lie. It may be different in cases where the servant is taken into the service of the defendant with notice of the existing contract, or is kept in such service after notice of the contract, so that the defendant gets a benefit; in such cases there may be some

(1) 2 E. & B. 216.

evidence of malice; though I have a difficulty in persuading myself that by giving a servant, whom I know to be a truant, half-a-day's work to save him from starvation I run the risk of making myself liable in tort to his master. If the cases to which Crompton J. refers be pushed to their logical conclusion, it would seem that if a man, having entered into the service of another to do a particular piece of work, say to sweep out a stable, goes away refusing to do the work, no one with notice of the facts can ever afterwards employ that person without rendering himself liable in tort to the man who originally employed him. Mere notice cannot, in my opinion, be at most more than some evidence of actual malice, rebuttable by shewing that, in fact, no malice existed. The cases to which Crompton J. refers are cases either of enticing servants from the service of their masters or of harbouring them after they have improperly left the service, and with notice, and the expressions enticing and harbouring appear to me to suggest a malicious intention to injure the master. Erle J. declined to limit the principle upon which he based his judgment in *Lumley* v. *Gye* (1) to contracts of service. He declared the principle to be of universal application, and he states it in these words (2): "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that whether he procures an actionable wrong or a breach of contract." Wightman J. puts the case in the same way (3): "It was undoubtedly primâ facie an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so." Both these learned judges evidently thought that actual malice was essential to the cause of action. In *Bowen* v. *Hall* (4) the action was against the defendants for wrongfully receiving and harbouring a servant after notice of his being the servant of the plaintiff. Brett L.J., in delivering a judgment in which Selborne L.C. concurred, states the facts upon which the judgment is based (5): "We were of opinion," he says, "that the act of the defendants was done with the

(1) 2 E. & B. 216.

(2) 2 E. & B. at p. 233.

(3) 2 E. & B. at p. 238.

(4) 6 Q. B. D. 333.

(5) 6 Q. B. D. at p. 337.

knowledge of the contract between the plaintiff and Pearson" (the servant); "was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously." Having found these as the facts, he proceeds to state the law as laid down in *Lumley* v. *Gye* (1) in the following terms: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." And later on he says (2): "Merely to persuade a person to break his contract, may not be wrongful in law or fact . . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act, if injury ensues from it." This again seems to me to shew that to support an action for procuring a breach of contract it is essential to prove actual malice. Lord Macnaghten in *Quinn* v. *Leathem* (3), speaking of the decision in *Lumley* v. *Gye* (1), says: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference." If this is the true rule, as it appears to me it may be, then in order to get a cause of action there must be an interference without sufficient justification; in other words, if from all the circumstances it appears that the interference was justified, the cause of action does not exist. In the *Mogul Case*, when it was brought before the Court of Appeal (4), Bowen L.J. put the case in very much the same way. He says (5): "Intentionally to do that which

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(1) 2 E. & B. 216.
(2) 6 Q. B. D. at p. 338.
(3) [1901] A. C. 495, at p. 510.
(4) (1889) 23 Q. B. D. 598.
(5) 23 Q. B. D. at p. 613.

1902

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Bigham J.

is calculated in the ordinary course of events to damage, and which does, in fact, damage, another in that other person's property or trade, is actionable, if done without just cause or excuse"; and (1), "The intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it," is forbidden. Thus it seems that the mere procurement of a breach of contractual rights is not necessarily actionable; and that it will not be actionable, if it appears to have been sufficiently justified (per Lord Macnaghten), or if it appears to have been done with just cause or excuse (per Bowen L.J.). What may be a sufficient cause or excuse is perhaps difficult to determine. But Bowen L.J. gives some indication of what may or may not amount to a sufficient cause or excuse. He says in the *Mogul Case* (2): "Then comes the question, Was it done with or without 'just cause or excuse'? If it was bonâ fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist, not the less because what was done might seem to others to be selfish or unreasonable: see the summing-up of Erle J. and the judgment of the Queen's Bench in *Reg.* v. *Rowlands.* (3) But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal, which had to decide, would have to analyze the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle J. in *Reg* v. *Rowlands* (4) of workmen and of masters: 'The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage.'" Then do the facts in the present case constitute a justification or excuse? I think they do. I have already found that there was no malice, no desire to injure; then why was the order to stop issued? It was issued because the men had asked the council of the federation to advise them from time to time as to when they should stop. Stopping, no doubt, involved a breach of the men's contract with their masters. But, if a man asks another for advice as to whether or not it is wise to break a contract, is not the person asked entitled (so long as he acts honestly) to give the advice, and if the advice is followed, do not the circumstances afford the man who gave it a sufficient excuse within the meaning of the rule? Solicitors, parents, and friends are over and over again consulted as to whether it is better to continue to perform a disastrous contract, or to break it and submit to a claim for damages. Do they by giving the advice, and so procuring the breach, make themselves liable in tort? Or does not the fact that they were asked for advice, and gave it honestly, afford a sufficient excuse for what they did? A man may persuade himself to break his contract, and the only consequence is that he renders himself liable in damages for the breach; he certainly does not thereby create a further cause of action against himself in tort. Then why should his friend, who advises him, and perhaps prevails upon him, to do the same thing, incur the consequences of such a course of action? In the present case I find that the federation and all the other defendants acted honestly, and without any malice, and in ordering the stop-days did no more than that which they conceived to be in the best interest of the men, whom they represented, and for whom they were acting; and I find, moreover, they had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and their right to give the advice, and to do what might be necessary to secure that the advice should be followed. Taking the view which I do of the facts of this case, it is only necessary to say a few words as to the cause of action founded on conspiracy. An actionable conspiracy exists when a number of men combine either to do an unlawful act or to do a lawful act by unlawful means. I have already said that in my opinion the acts of the individual defendants were not unlawful, and there is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff, and must cause him damage. Here no such conspiracy ever, in fact, existed, for there never was any malicious intention. My judgment, therefore, must be for the defendants on both branches of the plaintiffs' claim.

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(1) 23 Q. B. D. at p. 614.

(2) 23 Q. B. D. at pp. 618, 619.

(3) (1851) 17 Q. B. 671.

(4) 17 Q. B. at p. 687, n.

If this case is taken further and my judgment is reversed, it will then become my duty to inquire into the question of damages; but, even at the risk of being told that I am going outside my province, I strongly advise the parties to consider whether they cannot end this litigation. I doubt if it serves any useful purpose, and I am sure that it creates bitterness of feeling, and makes the relations between the masters and the men difficult and unpleasant.

The plaintiffs must pay the defendants' costs except the costs incurred by the federation in putting forward the defence that the federation was not responsible for the acts done in October and November, 1901. Those costs the federation must itself bear; and the federation must also pay such part of the plaintiffs' costs as is attributable to meeting that defence.

Judgment for the defendants.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for defendants: *Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1902
Nov. 24.

BAILEY *v.* THURSTON & CO., LIMITED.

Bankruptcy—After-acquired Property—Contract of Employment made before Bankruptcy—Breach of Contract after Bankruptcy—Right of Bankrupt to sue—Intervention of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

An undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action.

Judgment of Phillimore J., [1902] 2 K. B. 397, affirmed.

Application for a new trial or that judgment should be entered for the defendants in an action tried by Phillimore J. with a jury, reported on further consideration, [1902] 2 K.B. 397.

The action was brought to recover damages for the wrongful dismissal of the plaintiff from his employment by the defendants.

One of the defences pleaded was that the plaintiff was adjudicated a bankrupt before the action was brought, and remained an undischarged bankrupt when it was brought, and that the trustee was not a party to the action, which therefore could not be maintained.

The facts proved or admitted at the trial were, so far as is material for this report, as follows: By an agreement in writing, dated April 24, 1899, the defendants, who carried on the business of manufacturers of billiard-tables, agreed to employ the plaintiff, and he agreed to serve them, as their traveller for a period of five years from April 17, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him for them. Early in the month of June, 1901, the plaintiff was adjudicated a bankrupt. Subsequently, on June 29, 1901, the defendants dismissed him from their employment, and he thereupon brought his action for wrongful dismissal, being then an undischarged bankrupt. The jury gave a verdict for the plaintiff, damages 100*l.*; and on an application for judgment the learned judge adjourned the case for further consideration, and, after argument, directed that judgment should be entered for the plaintiff. (1)

The trustee in the bankruptcy of the plaintiff did not intervene at any stage of the proceedings.

The defendants appealed.

Nov. 18. *Kemp, K.C.*, and *E. W. Hansell*, for the defendants. With certain statutory exceptions all the property of a bankrupt vests in his trustee, including contracts, and the right to bring actions for breach of those contracts. It is immaterial whether the breach arises before or after the bankruptcy. In *Wadling* v. *Oliphant* (2) an undischarged bankrupt obtained by order of a Court a sum of money in lieu of proper notice of dismissal, and it was held that the sum was not personal earnings but compensation, and that the trustee was entitled to claim it. *Emden* v. *Carte* (3), in which the order of events was the same as that in this case, was also a case of wrongful dismissal in which the bankrupt sued, and Kay J. added the trustee, and gave him the conduct of the case. An appeal was dismissed, and the judgments in the Court of Appeal shew that the right of action had passed to the trustee. The wrong plaintiff had sued in that case, but there was no right to substitute another plaintiff in the action, and the Court did the next best thing by adding the trustee as plaintiff. Without that addition there would have been a good defence to the action. In respect of personal earnings after the bankruptcy, the bankrupt may sue subject to the right of the trustee to intervene; but cases as to the right of the trustee to intervene do not apply to such a case as the present, where there was a contract before the bankruptcy and a breach after it.

[They referred to *Stanton* v. *Collier* (4); *In re Byrne, Ex parte Henry* (5); *Osman* v. *Raphael*. (6)]

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(1) [1902] 2 K. B. 397.
(2) (1875) 1 Q. B. D. 145.
(3) (1881) 17 Ch. D. 169, 768.
(4) (1854) 3 E. & B. 274.
(5) (1892) 9 Mor. Bank. Rep. 213.
(6) (1896) 12 Times L. R. 376.

Lord Coleridge, K.C., and *Macoun* (with them *Bovill W. Smith*), for the plaintiff. Damages recovered for a breach, after the bankruptcy, of a contract of employment made before it are after-acquired property, in respect of which the trustee may intervene; but for such a breach the bankrupt may sue, unless and until intervention takes place: *Herbert* v. *Sayer* (1); *Jameson* v. *Brick and Stone Co.* (2) The right of the trustee to intervene, whether during the action or after verdict, does not affect the right of the bankrupt to sue. If a breach of contract takes place before the bankruptcy, the right of action passes to the trustee; but in this case the plaintiff after the bankruptcy was bound to go on serving the defendants, and the breach of contract on their part arose after the bankruptcy. If the trustee were to sue for the wrongful dismissal of the bankrupt, he would have to aver willingness and readiness on the part of the latter to go on serving—a matter over which the trustee could have no control. Further, this contract for personal service was not one that would pass to the trustee, because he could not undertake the obligations raised by it. If the contract did not vest in the trustee, he could not sue for the breach of it; and therefore the plaintiff was the proper person to bring the action. The case might have been different if the claim had included property other than personal earnings as in the case of an architect: *Emden* v. *Carte* (3); or of a doctor who supplied medicines: *Elliott* v. *Clayton* (4); but this claim arises only out of a contract for personal service. The opinions of the judges given in the House of Lords in *Beckham* v. *Drake* (5) shew that in such a case as this the bankrupt may sue. *Wadling* v. *Oliphant* (6), which is relied on to shew that the plaintiff could not sue, relates to the title of the trustee to money actually recovered by the bankrupt. The plea therefore, which does not aver that the trustee has intervened, is no answer to the action.

[They cited also *Williams* v. *Chambers* (7); *Ex parte*

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(1) (1844) 5 Q. B. 965.
(2) (1878) 4 Q. B. D. 208.
(3) 17 Ch. D. 169, 768.
(4) (1851) 16 Q. B. 581; 20 L. J. (Q.B.) 217.
(5) (1849) 2 H. L. C. 579.
(6) 1 Q. B. D. 145.
(7) (1847) 10 Q. B. 337.

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Dewhurst (1); *Ex parte Carter* (2); *Cook* v. *Whellock* (3); *Cohen* v. *Mitchell* (4); *In re Roberts.* (5)]

E. W. Hansell, in reply.

Cur. adv. vult.

Nov. 24. COLLINS M.R. This is an appeal from a decision of Phillimore J. on further consideration after the trial of the action with a jury.

The facts upon which the question before us arises are shortly that the defendants agreed to employ the plaintiff, and he agreed to serve them, as their traveller for a period of five years from April 17, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him. Early in June, 1901, the plaintiff was adjudicated bankrupt, and on the 29th of the same month the defendants dismissed him from their employment, and he thereupon brought an action for wrongful dismissal, being then an undischarged bankrupt, and recovered 100*l.*

In that action the defendants pleaded that the plaintiff was adjudicated a bankrupt before the action was brought, and was an undischarged bankrupt when it was brought; and that the trustee was not a party to the action, and that, in consequence, the action was not maintainable.

The question is whether that is a good defence, or, in other words, whether the action can be maintained by the plaintiff in his own name. The learned judge held on further consideration that the plea failed, and I have come to the conclusion that his judgment was right.

The principle applicable to this case is, in my opinion, clearly decided by *Beckham* v. *Drake*. (6) This is one of the class of cases in which the bankrupt's own labour is the only consideration on his part for the contract by his employers to employ him and pay him a salary, and does not come within the class of cases in which some other consideration is given by the bankrupt for his employer's contract.

(1) (1871) L. R. 7 Ch. 185.
(2) (1876) 2 Ch. D. 806.
(3) (1890) 24 Q. B. D. 658.
(4) (1890) 25 Q. B. D. 262.
(5) [1900] 1 Q. B. 122.
(6) 2 H. L. C. 579.

In case of the breach of such a contract as existed in the present case, complete at the date of the bankruptcy, and sounding in a money claim, there is no doubt that the right of action would pass to the trustee, and that he would be the proper person to sue. But so far as the contract for personal service was in fieri and still unperformed, it seems to me to be clear upon consideration of *Beckham* v. *Drake* (1) that an action for breach of contract would not belong to the class of actions which the trustee could claim the right to bring as assignee of the property of the bankrupt. Whatever claim he might have to the proceeds of such an action, he could not put in suit in his own right a contract which was still in fieri, and in respect of which it would be necessary to allege that the bankrupt was always ready and willing to perform his part. This view is very clearly stated in the opinions of the learned judges given at the hearing of *Beckham* v. *Drake* (1) in the House of Lords. I take, for example, a passage from the opinion of Cresswell J. at p. 615 of the report, which seems to me to put in a concrete form that which was said by several of the judges. The passage is this: "I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees." There is also a passage from the opinion of Parke B. at p. 625 of the report to the same effect: "The contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed." It may be observed that the contract under consideration in that case was very similar to that in the present case, for there was an agreement to employ the

(1) 2 H. L. C. 579.

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appellant for a term of years at a salary; and the action was for breach of that contract by dismissing the appellant before the expiration of the term. That breach, however, occurred before the bankruptcy, and the House of Lords held that the right of action for that breach passed to the assignee. The conclusion from the passages that I have cited is that there is no justification for the contention that this contract with all its incidents passed to the trustee. The cause of action for the wrongful dismissal of the plaintiff arose after his bankruptcy, and that, in the opinion of the learned judges, was a cause of action in respect of which the plaintiff could sue. There is a well-known principle in regard to rights accruing to the bankrupt after the bankruptcy and in respect of his personal services that, though the bankrupt is the proper person to sue in such a case, the trustee may intervene and take the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance. The questions whether the trustee can intervene in the action, and whether the bankrupt can maintain the action, are distinct, and the latter is the only one for our decision here, and, on the authorities that I have cited, the decision of the learned judge must be supported.

It has been argued for the defendants that the point has been decided in two cases in favour of the view that the trustee is the proper person to sue. The first of them is *Emden* v. *Carte* (1), a case decided by Fry J. The head-note of that case as reported on appeal is as follows: "The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—*Held*, that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action." The order of events was that the contract came first, then the bankruptcy, and then the dismissal. Fry J. held that he could not substitute the trustee, but could make him a party to the action. The appeal from his decision was dismissed by the Court of Appeal. Phillimore J. has dealt with that case in his judgment (1), and I agree with the learned judge that the decision does not involve the proposition that the action was one that could not be maintained by the bankrupt, without the trustee being made a plaintiff, but that it decided that the trustee could intervene. It was pointed out by Fry J. and in the Court of Appeal that the contract was not one of the narrow class arising only on the personal service of the bankrupt. The decision is not in point on the question before us, because it does not involve the proposition that the bankrupt could not maintain the action. The trustee would have the right to the proceeds of the action, and the Court gave him the opportunity of obtaining this by making him a party to the action.

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(1) 17 Ch. D. 169, 768.

The other case relied on is more easily distinguishable. In *Wadling* v. *Oliphant* (2) the head-note is as follows: "A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent Court 104*l.* as six months' salary in lieu of proper notice of dismissal:—*Held*, that the bankrupt's trustee could claim the money before it was paid to him, as against any creditors, subsequent to and without notice of the bankruptcy; for that, first, the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy." In that case there was an ascertained sum accruing to the bankrupt after the bankruptcy under the award of a Court, and in respect of that sum it was held that the trustee could intervene. This decision does not affirm that the bankrupt had no right of action, but upholds the right of the trustee to intervene. Neither of these cases, therefore, decides the point which is raised in the present case on behalf of the defendants.

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(1) [1902] 2 K. B. 397, at p. 401.

(2) 1 Q. B. D. 145.

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I am of opinion, therefore, that the principle to which I have referred as laid down in *Beckham* v. *Drake* (1) governs the present case, and that unless and until the trustee intervenes the plaintiff has a right to bring this action.

The defence raised by the defendants therefore fails, and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. It is important to observe the sequence of events in this case. First, there is a contract to employ the plaintiff for a term of years. The next event is the bankruptcy of the plaintiff and the appointment of a trustee in the bankruptcy; and after that there is the breach of contract in respect of which this action is brought to recover damages, the result of that action being that 100*l.* has been recovered.

The question raised is whether the bankruptcy of the plaintiff is an answer to his claim in the action, it not being proved or alleged that the trustee has intervened. It has been contended that on the bankruptcy of the plaintiff the contract vested in the trustee. The question as to what contracts vest on bankruptcy in assignees was considered by the Court of Exchequer in *Gibson* v. *Carruthers* (2), and Parke B. in his judgment said: "There can be no doubt that the effect of the assignment under 6 Geo. 4, c. 16, ss. 12 and 63, is to vest in the assignees, to use the language of Lord Tenterden in *Wright* v. *Fairfield* (3), every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees; such, in short, as would pass as part of his personal estate to his executors if he had died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration." It was, therefore, laid down that contracts in which personal skill was a material part of the consideration were excepted from the operation of the bankruptcy statute then in force. If that exception was in accordance with law there is nothing in any subsequent Bankruptcy Act to alter it, and the question before us really is whether the law was correctly laid down in the passage that I have quoted. Not very long after that decision there occurred the case of *Beckham* v. *Drake* (1), which was carried to the House of Lords. In that case the sequence of events was different from that which occurred in the present case. There was first in order the contract, next the breach, and afterwards the bankruptcy, and it was held that the right of action in respect of the breach vested in the assignee in bankruptcy. The House was advised by a large number of judges, many of whom expressed a clear opinion to the same effect as the judgment of Parke B. in *Gibson* v. *Carruthers*. (2) In addition to the opinions that have been referred to by the Master of the Rolls, I desire to call attention to those of Williams J. at p. 598 of the report, of Erle J. at p. 604, and of Wilde C.J. at p. 633. None of the learned judges expressed any opinion to the contrary effect, and in my judgment the view of Parke B. is supported by authority and is correct in principle. In the case of a contract in fieri and unexecuted, which cannot be completed without the assistance of the bankrupt, the trustee would be unable to complete it without the co-operation of the bankrupt, nor could the trustee compel such co-operation. Such a contract is incapable of assignment, and in my opinion it is impossible to hold that it would vest in the trustee on the bankruptcy occurring. Two cases—*Emden* v. *Carte* (3) and *Wadling* v. *Oliphant* (4)—were relied on to support the view that the plaintiff could not recover in this action; but they seem to me to decide no more than that the trustee may intervene and claim the damages which the plaintiff has recovered. Down to the present moment the trustee has not intervened, and the plaintiff is entitled to retain his judgment.

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(1) 2 H. L. C. 579.

(2) (1841) 8 M. & W. 321; 58 R. R. 713.

(3) (1831) 2 B. & Ad. 727, at p. 732.

COZENS-HARDY L.J. It has been established for many years that, notwithstanding the generality of the language used in

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(1) 2 H. L. C. 579.

(2) 8 M. & W. 321; 58 R. R. 713.

(3) 17 Ch. D. 169, 768.

(4) 1 Q. B. D. 145.

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the Bankruptcy Acts, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee and not the bankrupt will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. It is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveller for the defendants after the bankruptcy. The judgment of the Exchequer Chamber in *Drake* v. *Beckham* (1) and the opinions of the judges who advised the House of Lords in that case (2) place this matter beyond doubt. Further, there was not at the date of the bankruptcy any accrued right of action under the contract which might have vested in the trustee as in *Beckham* v. *Drake*. (2) So far as I am aware, there is no authority inconsistent with the view that I have expressed; and I think that the decision of the learned judge was right, and that this appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *Charles Goble Champion.*

Solicitors for defendants: *Gush, Phillips, Walters & Williams.*

A. M.

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(1) (1843) 11 M. & W. 315.

(2) 2 H. L. C. 579.

In re SALMON.
Ex parte THE TRUSTEE.

1902
Dec. 3.

Bankruptcy—Several Mortgages on same Property—First Mortgage reserving Right of Consolidation—Third Mortgage including other Property—Claim to redeem third Mortgage only—Consolidation—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 17.

Three mortgages of the same property were granted by the same mortgagor to three different parties, the third mortgage also including other property. Only the first mortgage contained a clause reserving a right of consolidation. On the bankruptcy of the mortgagor, the second mortgagee took transfers of the first and third mortgages:—

Held, that the trustee in bankruptcy could not redeem the third mortgage without also redeeming the first and second mortgages.

THIS was a motion which raised a question on the construction of s. 17 of the Conveyancing and Law of Property Act, 1881 (1), under these circumstances.

On May 9, 1883, the debtor, R. H. Salmon, by deed mortgaged some property to a certain person to secure the repayment of 6000*l*. with interest thereon. This mortgage contained the following proviso:—

"Provided always and it is hereby agreed and declared that the said R. H. Salmon or any person or persons deriving title or claiming under or through him, or entitled to redeem the premises hereby mortgaged or any of them, shall not in respect to the redemption of the mortgage hereby created have or be entitled to any of the powers expressed to be conferred on a mortgagor by the 17th section of the Conveyancing Act, 1881."

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(1) The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17, enacts: "(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

"(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act."

1902

SALMON, *In re.* THE TRUSTEE, *Ex parte.*

On March 19, 1900, the debtor executed a second mortgage of the same property to another person to secure the repayment of 1000*l.* and interest; and on February 23, 1901, he executed a third mortgage of same property to a third person to secure another 1000*l.* and interest. Neither of these two mortgages contained any reference to s. 17 of the Conveyancing Act, 1881; and the third mortgage also included a policy of assurance and an annuity of some value.

On July 24, 1902, a receiving order was made against the debtor, and adjudication followed. In August, 1902, the second mortgagee took transfers of the first and third mortgages to himself.

The trustee in the bankruptcy now claimed to redeem the third mortgage without redeeming the first and second mortgages.

Hansell, for the trustee.

Clauson, for the second mortgagee, objected to the jurisdiction of the Court. The second mortgagee is a stranger to the bankruptcy. The trustee's proper remedy is an action for redemption in the Chancery Division. But if the trustee will agree that, if the Court decides against him on this application, the order shall follow the common form of a foreclosure judgment, the objection will be withdrawn.

Hansell. The trustee will agree to that. On the authorities the right of the second mortgagee to take transfers of the other mortgages after the commencement of the bankruptcy cannot be contested. But it is contended that the trustee is entitled, by virtue of s. 17 of the Conveyancing Act, 1881, to redeem the policy and annuity without redeeming the two prior mortgages. The section abolishes consolidation unless a contrary intention is clearly expressed. The effect of the section is discussed in Wolstenholme on the Conveyancing Acts, 8th ed. p. 62; Robbins on Mortgages, vol. ii. pp. 865–6. There must be a clear and express contract reserving the right of consolidation: *Farmer* v. *Pitt.* (1) Here, the proviso in the first mortgage does not exclude s. 17 from all subsequent mort-

(1) [1902] 1 Ch. 954.

gages, but it is a contract limiting the right of consolidation to the property comprised in the first mortgage. It does not refer to subsequent mortgages, and cannot extend the subject-matter of the contract to other property which may be comprised in subsequent mortgages.

Clauson, for the second mortgagee. The authorities on consolidation are summarized in *Pledge* v. *White* (1), which shews that the trustee here must redeem all three mortgages, if he redeems at all. Sect. 17 really does not apply. First, because the section, on its true construction, is intended to apply to where there are several mortgages, each on different properties of the same mortgagor, and not to a case like this, where there are several mortgages on the same property, although no doubt one of them comprises other property. Secondly, because the proviso in the first mortgage expressly excludes the operation of the section.

Hansell, in reply. The doctrine of consolidation is not now favoured by the Courts: *Pledge* v. *White*. (2) Sect. 17 is directed against consolidation, and should be construed liberally and in favour of a mortgagor. The case falls within the section, for the third mortgage does contain property other than that comprised in the first mortgage, and it is submitted that the right to consolidate should be strictly limited to the property comprised in the first mortgage.

WRIGHT J. I am sorry I have to decide this question, as it is one with which I am not very familiar. It seems to me that s. 17 of the Conveyancing Act, 1881, does not apply to this case, but is intended to apply to cases where there are several mortgages, each on different properties of the mortgagor. I think the language of the section indicates that intention—I treat the marginal note as not material—and that it deals with consolidation proper, that is to say, with claims of consolidation over different properties in several mortgages; and it seems to me that that view is borne out by the wording of sub-ss. 1 and 2. But, however that may be, all the mortgages here came into existence after the passing of the Act, and all that s. 17 says is

(1) [1896] A. C. 187.

(2) [1896] A. C. 187, at p. 192.

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SALMON, *In re.* THE TRUSTEE, *Ex parte.*

Wright J.

that there shall be no consolidation except by express contract. Now, in this case, the first mortgage does contain a clause reserving a right of consolidation. [The learned judge read the clause in question, and continued:—] That is an express contract excluding the operation of s. 17. Mr. Hansell urged that the clause must be read strictly, and was limited to the property in the first mortgage. But it seems to me that, if that contract is to be confined to the first mortgage, it would have no meaning at all, because it is impossible to give it any effect or operation until other mortgages come into existence to which it would apply. In my judgment there is here nothing to exclude either the second or the third mortgage from the operation of that clause, and therefore the respondent, by virtue of that contract in the first mortgage, has expressly reserved to him the right to consolidate all three mortgages.

There must be a declaration that the trustee in bankruptcy is not entitled to redeem the third mortgage without also redeeming the other two mortgages, and the order dismissing his motion when drawn up will follow the common form.

Solicitors: *Simpson, Cullingford & Co.; Collyer-Bristow, Hill & Co.*

H. L. F.

In re LAKE.
Ex parte CAVENDISH.

1902
Dec. 4, 8, 15.

Bankruptcy—Mortgages of Policies—Equitable Interests—Notice—Priorities.

A solicitor entrusted by a client with money to invest misappropriated it. Afterwards he executed a mortgage of certain life policies in favour of the client to secure part of the money misappropriated, but did not inform the client of the existence of the mortgage nor give notice of it to the insurance offices. Subsequently, he made a second mortgage of the same policies to a clerk in his office as a trustee for other clients whom he had defrauded, but did not disclose the first mortgage. The second mortgagee gave notice to the insurance offices. On the bankruptcy of the solicitor the first mortgage was discovered, and notice of it was at once given to the insurance offices:—

Held, that the second mortgagee was entitled to priority over the first mortgagee.

THIS was an application that raised a question of priority between two equitable incumbrancers under the following circumstances.

In September, 1898, F. Cavendish became entitled to a sum of 15,000*l.* in the hands of trustees, for whom the firm of Lake & Lake were acting as solicitors. F. Cavendish, who was abroad, wrote and instructed Lake & Lake to receive and invest the money for him. They advised him by letter that they had invested his money, but in fact they misappropriated it.

On April 6, 1899, B. G. Lake, one of the partners in Lake & Lake, executed a mortgage of certain policies of assurance to which he was entitled (subject to prior charges) in favour of F. Cavendish, to secure to him the payment of 12,500*l.*, part of the money misappropriated. B. G. Lake did not inform F. Cavendish of the existence of this mortgage, nor did he give notice of it to the insurance offices. In November, 1899, G. Lake, the other partner in Lake & Lake, died, and the business was carried on by B. G. Lake as the surviving partner.

On December 18, 1899, B. G. Lake executed another mortgage of the same policies to one Cox, a clerk in his office,

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as trustee for the benefit of other clients of the firm who had been defrauded, but did not disclose to Cox the existence of the mortgage of the previous 6th of April. In June, 1900, Cox gave notice of his mortgage to the insurance offices, and shortly afterwards B. G. Lake became bankrupt. On December 5, 1900, the mortgage of April 6, 1899, was found at B. G. Lake's office, and notice of it was at once given on behalf of F. Cavendish to the insurance offices.

F. Cavendish now claimed a declaration that his mortgage was entitled to priority over Cox's mortgage.

H. Reed, K.C., and *J. Johnson*, for F. Cavendish. This is a case of two equitable incumbrances on the equities of redemption of certain policies created by the same grantor. In the first place, Lake held the money as solicitor for Cavendish with instructions to invest, and therefore stood in a fiduciary position towards him, and under the circumstances constituted himself by the mortgage of April 6, 1899, a trustee of the property for Cavendish, and could not by his subsequent mortgage to Cox give the parties claiming under that mortgage a title paramount to that of his cestui que trust, Cavendish. The case is covered by the dictum of Jessel M.R. on the second point raised in *Mumford* v. *Stohwasser*. (1) The decision on the main issue in that case has been overruled in *Hunt* v. *Luck* (2), but leaves the dictum now relied on unaffected. Secondly, the doctrine of priority by notice rests on laches or diligence—the most diligent gets priority: *Dearle* v. *Hall* (3); *Loveridge* v. *Cooper*. (4) Here, the question of laches or diligence does not arise, for it was impossible for Cavendish to give notice until December 6, 1900. In all the cases there has been some omission, neglect, or laches which has deprived the party of his rights. Unless the doctrine of priority by notice, apart from laches or diligence, is a hard and fast rule, it should not be applied to a case like this.

R. B. Acland, for Cox. As to the first point, the dictum of Jessel M.R. does not apply. Lake was not a trustee for

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(1) (1874) L. R. 18 Eq. 556, at p. 562.

(2) [1902] 1 Ch. 428.

(3) (1828) 3 Russ. 1; 27 R. R. 1.

(4) (1828) 3 Russ. 30; 27 R. R. 1.

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Cavendish. As to the second point, the principles of priority do not rest only on laches or diligence, but on notice: *Foster* v. *Cockerell.* (1) Cox was undoubtedly the first to give notice without any knowledge of the prior charge, and is therefore entitled to priority.

Northcote, for the trustee in bankruptcy.

Reed, K.C., in reply.

Cur. adv. vult.

Dec. 15. WRIGHT J., after stating the facts, continued:—The question is, Which of two equitable incumbrancers is entitled to priority? The ordinary rule in cases of equitable assignment is that that one obtains priority who is the first to give notice. Now, here it was contended that Lake was a trustee for Cavendish, and a dictum of Jessel M.R. in *Mumford* v. *Stohwasser* (2) was relied upon. But it seems to me that the dictum does not apply, because the facts of this case do not raise the same question. Then it was said that the doctrine of priority by notice depends on laches, and that Cavendish had not been guilty of any negligence because he had given notice directly he knew of his mortgage. But I think the point is disposed of by the judgment of Lord Lyndhurst in *Foster* v. *Cockerell.* (3) He says: "This was a question of priority between two equitable incumbrancers—a question whether the subsequent incumbrancer of the equity, having given notice to the trustees of the fund, was entitled to priority over the former incumbrancer. Now, that question has been settled, after much deliberate discussion, in the cases of *Dearle* v. *Hall* (4) and *Loveridge* v. *Cooper.* (5) Those two cases were argued before Sir Thomas Plumer as Master of the Rolls with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this description the party who gave notice to the trustees was entitled to the priority; and, without adverting to the particular facts of those

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(1) (1835) 9 Bli. (N.S.) 332; 39 R. R. 24.

(2) L. R. 18 Eq. 562.

(3) 9 Bli. (N.S.) 332, at p. 375.

(4) 3 Russ. 1; 27 R. R. 1.

(5) 3 Russ. 30; 27 R. R. 1.

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cases, the principle upon which the decision was founded was this, that if a contrary doctrine were to prevail, it would enable a cestui que trust to commit a fraud; he might assign his interest first to one and then to a second incumbrancer, and that second incumbrancer would have no opportunity by any communication with the trustees of ascertaining whether or not there had been a prior assignment of the interest. There was also another principle upon which he decided that case, which was this, that a party till he gives notice to the trustees has not done everything necessary to complete his title. In such cases it is necessary for the parties to do everything in their power. Further than that he assigns, as an additional reason, that until notice was given to the trustees, they did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general rule, that in case of an equitable assignment, the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority, if the former incumbrancer had given no such notice. . . . The principle of those authorities applies directly to the present case." According to that authority, the rule which prefers that assignee who has given the prior notice does not depend solely on the imputation of laches to those who have not given notice; and even in the absence of laches the other grounds for the rule exist. Nor, I think, has the question ever been treated as one merely of laches. The Courts seem to me to have in modern times asked only which assignee was the first to perfect his security by notice. I hold therefore, even although this is an extreme case, that Mr. Cavendish is not entitled to priority over the second mortgagee.

Solicitors for Mr. Cavendish: *Bompas, Bischoff & Co.*
Solicitors for Mr. Cox: *Longbourne, Stevens & Co.*
Solicitors for trustee in bankruptcy: *Leigh & Pemberton.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1902
Nov. 27.

CLARKE AND WIFE *v.* ARMY AND NAVY CO-OPERATIVE SOCIETY, LIMITED.

Negligence—Sale of Goods—Dangerous Goods—Knowledge of Vendor—Duty of Vendor to Purchaser—Warranty of Fitness—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned of it:—

Held, that, independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger.

Where one of the rules of a co-operative society stated that no warranties were given with goods sold by the society, except on the written authority of one of the managing directors or the assistant manager:

Query, whether the rule had the effect of excluding the implied warranty that an article sold for a particular purpose is fit for that purpose.

Application for judgment or a new trial by the defendants in an action tried before Wills J. and a jury.

The action was brought by a husband and his wife to recover damages in respect of personal injuries occasioned to the female plaintiff through a tin of chlorinated lime sold to her by the defendants, the cause of action being put by the statement of claim alternatively, either as a breach of a warranty that the article sold was fit for the purpose for which it was supplied, or as a breach of a duty arising under the circumstances to warn a purchaser of the explosive or otherwise dangerous character of the article sold.

The facts, so far as material to this report (1), were as follows. The defendants were the owners of co-operative stores, the male plaintiff being one of their ticket-holders. The female plaintiff went to a branch store of the defendants at

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(1) There was a considerable amount of argument as to matters of fact, and the meaning of the findings of the jury in connection therewith, which had no bearing on the points of law for which this case is reported. The statement in the text only gives so much of the facts, arguments, and judgments as is material to those points.

Plymouth, and asked an assistant in the service of the defendants there to let her have some chloride of lime for disinfecting purposes. The assistant recommended her to have some chlorinated lime, which was sold in the form of a powder in tins. She accordingly bought a tin of chlorinated lime. No warning was given to her of any danger connected with the tin. On the next day she proceeded to open the tin by prising the lid up in the usual way with a spoon, and thereupon what she described as a sort of explosion took place with the result that a portion of the contents of the tin flew up in the air to a considerable height, and was scattered about, and some of the powder got into her eyes, occasioning the injuries in respect of which the action was brought. The rules of the defendant society, which were published in their price-list supplied to ticket-holders, contained a clause which was as follows: "No warranties are given with the goods sold by the society, except on the written authority of one of the managing directors or the assistant manager." It appeared that the tin sold to the female plaintiff had formed one of a small consignment of eighteen similar tins, which had been supplied to the defendants' Plymouth store. Eleven of these tins had been sold, and seven were sent back again to the manufacturer after the accident to the female plaintiff. Three of the tins were sold to a Mrs. Stebbing, to whom, upon her opening one of them, an accident happened similar to that which occurred in the case of the female plaintiff. This was before the sale of the tin to the female plaintiff. One of the tins had been sold to another lady, to whom a similar accident happened in opening it. Four other tins had been sold by the defendants at Plymouth to another lady, in the case of one of which a similar accident occurred. The defendants' manager did not admit that these latter tins had formed part of the same consignment, but it was suggested for the plaintiffs that they had. Upon the accident happening to Mrs. Stebbing her husband at once wrote a letter to the defendants' manager at Plymouth, informing him of the accident, and describing what had happened on the opening of the tin. The defendants' manager thereupon gave instructions to his assistants to the effect that a warning should be given to purchasers of similar tins of the necessity for care in opening them. In the course of the trial, one of the tins which had formed part of the before-mentioned consignment being in court, the manufacturer of the article, who was called as a witness for the defendants, was asked by a juryman to open it, which he accordingly did. A considerable amount of force was required in order to prise the tin open in the usual way, and, upon its being opened, a portion of the contents flew up to a considerable height in the air, and was scattered about, some falling over the witness. The evidence on the question whether there could have been an explosion of the contents of the tin was to some extent conflicting, and there was a considerable amount of evidence tending to negative the suggestion that there had been such an explosion. The jury found that there was no explosion, but that the tins were badly constructed, and conducive to danger, and that the defendants, having had warning from Mr. Stebbing, were negligent in not taking steps to stop further accidents; and they thereupon found a verdict for the plaintiffs for 172*l.* damages.

R. M. Bray, K.C., and *H. A. Colefax*, for the defendants. The case for the plaintiffs as stated in their pleadings, and as fought at the trial, was that there had been an explosion, and that this chlorinated lime was explosive. The evidence on both sides was really directed to that point. The jury found that there was no explosion, and their further finding was really irrelevant to the case as contested between the parties. The verdict therefore ought to have been for the defendants.

The defendants' rule, of which the plaintiffs must be taken to have had notice, distinctly states that no warranties are given with goods sold by the society, and, its terms being perfectly general, they exclude any implied warranty, such as an implied warranty of fitness for the purpose for which the article is sold. By s. 55 of the Sale of Goods Act, 1893, where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement between the parties. As between the parties to the contract of sale, all obligations with regard to

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the nature or quality of the goods must be looked for in the contract itself, and it is contended that in a case like this there cannot be a duty created by the relation of vendor and purchaser towards the purchaser, outside the contract, with reference to the quality or character of the goods sold.

[Collins M.R. In *George* v. *Skivington* (1) Kelly C.B. distinctly states that there is in such cases a duty towards the purchaser imposed on the vendor to use reasonable care, independently of warranty.]

That case has been unfavourably commented upon.

[Collins M.R. It has been held, in cases of injuries to railway passengers and bailments, in relation to questions of costs and otherwise, that there was a liability for negligence ex delicto, apart from the contract: see, for instance, per Blackburn J. in *Austin* v. *Great Western Ry. Co.* (2); *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3); *Kelly* v. *Metropolitan Ry. Co.* (4)]

Assuming that there could be any such duty to warn the purchaser of the dangerous character of goods sold, that duty can only arise in a case in which the goods are necessarily dangerous, and the danger is obvious to the defendants, which was not the case here. In the absence of any warranty, in any case the duty of the vendor of an article towards the purchaser could be no higher than his duty would be to a third person, for whose use the article was to his knowledge bought. In the cases in which a vendor of a dangerous article has been held liable to a third person for injuries thereby occasioned, there was something in the nature of active negligence or misfeasance on the part of the defendant, as, for instance, in *George* v. *Skivington* (1), where the deleterious hair-wash was compounded by the defendant himself. In *Langridge* v. *Levy* (5) the decision was based on the fact that the defendant had fraudulently represented the gun to be safe: see also *Longmeid* v. *Holliday*. (6) The cases do not shew that a vendor of goods can be liable in an action for mere passive negligence in respect of the character of the goods supplied. There was really no evidence of negligence in this case. The jury have negatived the suggestion that the chlorinated lime was explosive. The instructions given by the defendants' manager to his assistants were given because it was thought that the lime might be explosive. Surely it cannot be negligence not to warn purchasers that, in opening a tin, which requires a certain amount of force, they should be careful lest the contents should be jerked out and get in their eyes.

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(1) (1869) L. R. 5 Ex. 1.

(2) (1867) L. R. 2 Q. B. 442, at p. 445.

(3) [1895] 1 Q. B. 134.

(4) [1895] 1 Q. B. 944.

(5) (1837) 2 M. & W. 519; (1838) 4 M. & W. 337; 46 R. R. 689.

(6) (1851) 6 Ex. 761.

[They also cited *Foulkes* v. *Metropolitan Ry. Co.* (1) ; *Ward* v. *Hobbs* (2) ; *Winterbottom* v. *Wright*. (3)]

J. Eldon Bankes, K.C., and *R. J. Neville*, for the plaintiffs. The defendants are liable for a breach of the warranty which is implied by the law, as now embodied in the Sale of Goods Act, 1893, s. 14, sub-s. 1, namely, that an article sold for a particular purpose is reasonably fit for that purpose. The true construction of the clause in the defendants' rules is that it is intended to exclude only express warranties given by their servants on the purchase of goods, and not the condition implied in the sale of an article for a particular purpose.

[They cited on this point *Randall* v. *Newson* (4) ; *Vogan & Co.* v. *Oulton*. (5)]

Secondly, the defendants are liable for a breach of duty, apart from any question of warranty. The authorities shew that there is cast on any person who supplies or delivers an article, which he knows, or ought to know, to be dangerous, to another person, who presumably is ignorant of the danger, for use by that person, a duty to warn him of the danger. The existence of a contract between the two persons does not prevent the existence of that duty by law independently of the contract. That duty exists as between the vendor and purchaser of an article, independently of any question of warranty, just as much as between any other persons respectively delivering and receiving a dangerous article: see per Lord

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(1) (1879) 4 C. P. D. 267.

(2) (1878) 4 App. Cas. 13.

(3) (1842) 10 M. & W. 109.

(4) (1877) 2 Q. B. D. 102.

(5) (1898) 79 L. T. 384.

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Esher in *Heaven* v. *Pender* (1); *George* v. *Skivington*. (2) In this case the tin was clearly dangerous in fact, but the danger was not of a character that could be known to a purchaser without warning of it. It is not really material whether the tin was dangerous by reason of liability to explode or for some other reason. The statement of claim sufficiently raised the question whether it was dangerous for any reason, and there was abundant evidence to justify the finding of the jury that it was, even though they negatived the suggestion that there had been an explosion. The defendants' manager had reason to suppose that the tin was likely to be dangerous on account of the accident which had previously happened in Mrs. Stebbing's case, and he clearly appreciated the danger, because he gave instructions that the tins were not to be sold without warning to the purchaser.

[They also cited *Brass* v. *Maitland*. (3)]

R. M. Bray, K.C., for the defendants, in reply.

COLLINS M.R. In this case the action is brought by the plaintiffs in respect of personal injury caused to the female plaintiff, while opening a tin of chlorinated lime, which she had purchased from the defendants. She appears to have thought that the tin exploded; but in any case there is no doubt that, in the process of opening the tin, a portion of its contents flew out, and some got into the female plaintiff's eyes. The cause of action, as stated in the plaintiffs' statement of claim, appears to me to cover a breach of duty by the defendants in neglecting to warn the female plaintiff of the dangerous nature of an article sold, whether the danger arose from its liability to explode or from any other cause. The jury found that there was no explosion; but they found that the tins were badly constructed and conducive to danger, and that the defendants, having had warning from Mr. Stebbing, were negligent in not taking steps to stop further accidents; and they then proceeded to give a verdict for the plaintiffs. It seems to me that there was sufficient evidence to support that verdict; and I see nothing inconsistent with it in the special findings which the jury gave.

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(1) (1883) 11 Q. B. D. 503, at pp. 507, 510.

(2) L. R. 5 Ex. 1.

(3) (1856) 6 E. & B. 470.

The facts of the case appear to have been as follows. The female plaintiff went to the defendants' branch store at Plymouth, and asked for some chloride of lime. She was recommended to have another disinfectant instead, namely, chlorinated lime, and accordingly she purchased some in a tin. Nothing further of a material nature passed on the occasion of the purchase. She took the tin home, and, in the process of opening it, the accident, which she called an explosion, happened, that is to say, some of the contents of the tin flew up and went into her eyes. This accident happened upon her opening the tin in the ordinary way, and the defendants were unable to shew any negligence on the part of the plaintiff with regard to the manner in which she opened it. The question is whether under the circumstances the defendants are liable for the consequences of that accident to the female plaintiff. It was proved that the tin in question was one out of a particular small consignment, from tins forming part of which accidents had arisen in three cases besides the present. There was evidence which shewed that the defendants had been informed of one of these accidents before the tin was sold to the plaintiff; and that the defendants' manager, whose business it was to attend to such matters, considered the tins to be so far dangerous that they ought not to be sold without warning purchasers of the possibility of danger in opening them. I do not think it is very material whether he attributed their being dangerous to the right reason or not. He clearly knew that the tins were potentially dangerous, for he instructed his assistants not to sell them without giving a warning to purchasers. The assistant who sold the tin to the female plaintiff, notwithstanding these instructions, sold it to her without any warning, the result being, as I have said, that, upon her opening the tin in the ordinary way, without taking any special precautions, the accident happened.

It was argued for the defendants that, upon the finding of the jury that there was no explosion, they were entitled to the verdict, and that the other finding of the jury was really irrelevant, the only case suggested by the statement of claim, or gone into at the trial, being that the contents of the tin were explosive, and that there had been an explosion. I have already stated that I think the statement of claim covers a cause of action based upon the existence of some danger in the tin otherwise than by reason of liability to explode; and it appears to me that there was clearly evidence which raised the question of such a danger for discussion at the trial; inasmuch as one of the witnesses called for the defendants went through a demonstration of the manner in which the tins ought to be opened, and the result of that demonstration seems to have been that the tin could not be opened without considerable pressure, and that, in the process of opening, the contents of the tin flew out in the same manner as when the plaintiff opened the tin supplied to her. I think the evidence raised the question whether, having regard to the nature of its contents, the tin was so constructed as to be reasonably fit and safe for the purpose of being opened in the ordinary way, or was dangerous for that purpose. It appears to me that the question so raised was discussed before the jury, and dealt with by the summing-up of the learned judge. I do not think it matters very much in the result whether the danger arose from some explosive quality in the contents of the tin, or from some defect in the tin for the purpose of being opened, having regard to the nature of what it had to contain. The question was raised and discussed whether to the knowledge of the defendants the tin with its contents was, from whatever cause, dangerous. If, though the statement of claim covered a danger otherwise than by explosion, the defendants had conducted their case in ignorance of any suggestion of any other danger, and had had no opportunity of developing their defence in that respect, different considerations would have arisen. But I do not think that was the case. Therefore, the second finding of the jury cannot be treated as irrelevant, and the question is what, upon that finding, are the rights of the parties in point of law?

The defendants' counsel relied in the first place on the clause in the defendants' rules which provides that "no warranties are given with the goods sold by the society except on the written authority of one of the managing directors or the assistant manager." They contend that this clause must be taken to have been known to the plaintiffs, with which I agree; and that it has the effect of excluding from the contract of sale all warranties, including such as would otherwise be implied from the sale itself. By the Sale of Goods Act, 1893, s. 14, sub-s. 1, which only formulates the already existing law on the subject, it is provided that, "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." In cases to which this provision applies, the condition is made an essential part of the sale itself; it is not a question of adding something collateral not inherent in the contract of sale. The question is whether the defendants' counsel are right in contending that the effect of the clause in the defendants' rules, to which I have alluded, is, not only to prevent the introduction into the contract of sale of any warranty not implied in the sale itself, but also to take out of the contract that element which is by law made an essential part of it. I am very much disposed, as at present advised, to think that so to construe the rule would be to extend it beyond its obvious purpose and the words used. The words are, "no warranties are given with the goods sold." The condition implied by virtue of the section can hardly be said to be a warranty given with the goods sold. It is made by law a part of the sale itself. If parties to a contract of sale wish to exclude such a condition, I am inclined to think they ought to use plainer words than those of this rule. The inclination of my mind, therefore, is towards the conclusion that the rule only applies to express warranties, which are not embraced in the sale itself, but have to be introduced into it; and that it does not exclude an implication which arises out of the sale itself. Assuming that to be the true construction of the rule, then, if the tin with its contents was not reasonably fit for the purpose for which it was supplied, which would appear to be the case, if the tin could not be opened without danger by a person using ordinary care, the defendants might be liable as for a breach of the implied warranty mentioned in the Sale of Goods Act, 1893. But it is not necessary to rest our judgment on that ground, because there is another ground upon which, in my judgment, the plaintiffs are entitled to succeed.

As I have said, it was known to the defendants that these tins were dangerous, by which I mean potentially dangerous; for it is not necessary that they should know that the particular tin would behave as it did upon being opened: they knew that it was one of a consignment of tins of which there was reason to suppose that they might be dangerous to open. I think that is a sufficient foundation for a duty on their part as vendors to take reasonable care to prevent injury to purchasers, by warning them of possible danger in opening the tins, of which presumably they would be ignorant. The defendants' representative seems himself to have acknowledged the existence of such a duty by the instructions which he gave that purchasers were to be warned. The defendants' counsel contended, in answer to the suggestion of such a duty, that the contract of sale sweeps into itself all collateral obligations of the vendors arising out of the sale, and excludes any duty not derivable from its terms; and therefore, unless such a duty to use care as I have mentioned can be derived from those terms, it does not exist. I do not agree with that contention. I do not think that the contract, which is mainly concerned with the passing of the property, does necessarily exhaust all the obligations of the parties. It seems to me that, independently of any warranty, a relation arises out of the contract of sale between the vendor and purchaser, which imposes on the former a duty towards the latter; namely a duty, if there is some dangerous quality in the goods sold, of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be requisite. If that duty existed, it was not performed in the present case. The defendants cannot be in a better position because some subordinate disobeyed the order given to him by selling the tin without giving a warning to the plaintiff than if their manager had himself so sold it, knowing of the danger. It is not necessary to go through the authorities to which I referred during the argument, and which appear to me clearly to shew that, independently of contract, there is a duty to a purchaser on the part of a vendor such as I have mentioned; and if the vendor, under such circumstances, knowing that the goods sold are dangerous, delivers them to the purchaser without giving him any warning, he does not discharge that duty, or at any rate there is evidence of negligence on his part for a jury. For these reasons I think the application should be dismissed.

Romer L.J. I am of the same opinion. Putting aside for a moment the findings of the jury, the facts of the case are these. A small parcel of these tins of chlorinated lime was being sold by the defendants. I gather that there had only been three or four purchases of these tins besides that made by the plaintiff, and in the case of three of them an accident had happened, similar to that which occurred in the present case, by reason of the purchaser attempting to open a tin in the usual way without any want of care. The evidence therefore appears to shew that, though the accidents may not have arisen from anything which could strictly speaking be called an explosion, still the tins forming this particular consignment were dangerous in the sense that, having regard to the construction of the tins coupled with the nature of their contents, danger was occasioned when they were opened in the ordinary way in which such tins are opened. The evidence shews that this danger was known to the defendants through their representative before the sale to the plaintiff. The accident which had happened in the case of Mrs. Stebbing had been communicated to the defendants' manager at Plymouth, who for this purpose represented the defendants;

C. A.
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Romer L.J.

and it is clear that he so far appreciated the nature of the accident, and the danger that might ensue unless purchasers were warned, that he expressly instructed his subordinates not to sell the tins without a special warning to customers. I do not think it is material that he may have been mistaken as to the precise reason why these tins were dangerous. It appears to me sufficient that the defendants' manager knew that the tins were dangerous in the sense that special care was required in opening them, and, that being so, I think there was a duty imposed on the defendants through him to warn the plaintiff that such care was requisite; and, that duty not having been performed, and the plaintiff having thereby been injured, the defendants are liable. I think that, apart from any question of warranty, there is a duty cast upon a vendor, who knows of the dangerous character of goods which he is supplying, and also knows that the purchaser is not, or may not be, aware of it, not to supply the goods without giving some warning to the purchaser of that danger. Of course that duty may be rebutted by special circumstances, as for instance by a warning that the purchaser must take the goods "with all faults," as in the case of *Ward* v. *Hobbs*. (1) But, apart from special circumstances, I think such a duty exists. That duty being cast on a vendor, he is not relieved from it by employing a servant who either does not know of the danger, or does not choose to comply with his instructions to warn customers, or forgets them. On the merits, therefore, it seems to me that the defendants ought to be held liable. The findings of the jury appear to me, when fairly interpreted, to shew that they intended to find a verdict for the plaintiffs on the grounds indicated by what I have already said. I think those findings really mean that the jury thought that the tins forming this particular consignment were badly constructed and conducive to danger, because, having regard to the nature of their contents, they were dangerous to open in the ordinary way; and that, the accident in the case of Mrs. Stebbing having been communicated to the defendants, they had warning of the danger; and, that being so, they were negligent in not taking any steps to prevent further accidents by giving some warning to a purchaser.

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(1) 4 App. Cas. 13.

As regards the only remaining point, namely, the meaning of the clause in the defendants' rules as to warranties, I am not satisfied that that rule is intended to apply to the implied warranty which arises when goods are sold for a particular purpose to the knowledge of the vendor. I will merely say that I doubt whether it is not applicable to express warranties only, and therefore cannot apply to such an implied warranty as is contemplated by the Sale of Goods Act, 1893, s. 14. It is, however, not necessary to decide that point in the present case.

MATHEW L.J. I am of the same opinion. It is not necessary in this case to decide the question whether the plaintiffs can recover against the defendants upon a breach of any implied warranty as to the fitness of this tin for the purpose for which it was purchased. It was argued that the clause in the defendants' rules, which has been referred to, excludes such a warranty. That clause must receive a reasonable construction. I am disposed to think that its meaning is merely that the defendants' society will not recognise express warranties given by their servants when goods are sold, unless they are given on the written authority of one of the managing directors or the assistant manager, and that it cannot be meant to affect that which in such a case is of the essence of the contract of sale—namely, the condition that the article sold is reasonably fit for the purpose for which it is sold. But, as I have said, it is not necessary to decide this point, for there lies behind it another and a more important question, which is independent of the construction of the contract—namely, whether there was not in this case a duty owed by the defendants to the plaintiff, apart from any warranty, and a breach of that duty by the defendants. That question arises under the following circumstances. It was, in my opinion, proved that the defendants through their officials knew that tins forming part of the consignment to which the tin in question belonged were likely to be dangerous. The defendants cannot reasonably suggest that the persons who had opened these tins, and to whom accidents had happened, were guilty of negligence. The defendants' manager was informed of the accident to Mrs. Stebbing; and it was regarded by him as a matter of such importance that he at once gave orders that none of the tins should be sold without warning the purchasers of the necessity for care in opening them. It is therefore clear that he recognised the fact that the tins were dangerous, and that it was the duty of the defendants to take steps to protect customers from that danger. Unfortunately the assistant who sold the tin to the female plaintiff disregarded his instructions, and gave her no warning. There was, it should furthermore be observed, evidence that these tins were dangerous in addition to the fact that accidents had previously happened. A most significant incident occurred at the trial. A witness called for the defendants opened one of the tins in court, and thereupon there was the very same kind of accident as had happened to the plaintiff. The effect of the findings of the jury appears to me to be that they came to the conclusion that the defendants through their officers knew, or had the means of knowing, that the tin supplied to the female plaintiff was likely to be dangerous, and, consequently, they were negligent in not having taken any steps to warn her of the danger. They therefore gave a verdict for the plaintiffs, and it seems to me that there was abundant evidence to support that verdict. Upon the facts as they appear from the evidence and the findings of the jury, I think there was a duty on the part of the defendants to warn the female plaintiff of the danger that might arise in opening the tin with which they supplied her, and, if there was such a duty, there was unquestionably a breach of it. For these reasons I think that the application must be dismissed.

Application dismissed.

Solicitor for plaintiffs: *H. G. Church.*
Solicitors for defendants: *Tyrrell Lewis & Co.*

E. L.

HAYLES, APPELLANT; SANDOWN URBAN DISTRICT COUNCIL, RESPONDENTS.

1902
Oct. 28.

Local Government—Private Street Works—Completion of Works—Final Apportionment of Expenses—Frontager—Right to question Apportionment —Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), s. 12.

By s. 12 of the Private Street Works Act, 1892, "When any private street works have been completed, and the expenses thereof ascertained," the urban authority's surveyor shall make a final apportionment of the expenses, which final apportionment shall be conclusive for all purposes, and the owners of premises affected thereby may, within one month after receiving notice thereof, object thereto upon the grounds (inter alia), or either of them, that the final apportionment has not been made in accordance with the section, and that there has been an unreasonable departure from the deposited specification, plans, and sections.

An urban authority employed a contractor to execute, under the powers given by the Act, works of paving, &c., in a street according to a specification, plans, and an estimate duly made and deposited. Being satisfied on the report of their surveyor, who had inspected the work from time to time during its progress and given certificates for payments on account to the contractor, that it had been satisfactorily completed, they paid the contractor the balance of the contract price, and the surveyor then made a final apportionment of the expenses among the owners, notice of which was served upon them. The appellant, an owner affected by the final apportionment, did not object thereto within one month after he received the notice; but the urban authority having, after the month had expired, taken summary proceedings to obtain payment of the sum apportioned upon him, he objected before the justices that the works had not been "completed" within the meaning of s. 12, because the road and footways of the street had not been formed and levelled, nor had they been ballasted or metalled to the thickness, or with the materials, specified in the specification, nor did the channelling and kerbing comply therewith, and that the surveyor had, therefore, no power to make a final apportionment of the expenses :—

Held, that the appellant could not take those objections before the justices, and that they were right in rejecting evidence in support of them.

CASE stated, under the Summary Jurisdiction Acts, by six justices of the county of Southampton.

At a Court of summary jurisdiction held at the Guildhall, Newport, Isle of Wight, a complaint was made by the clerk to the respondents, the Sandown Urban District Council, to recover from the appellant 38*l.* 7*s.* 1*d.*, and interest, the amount alleged to be due from him to them, according to an apportionment made by their surveyor under s. 12 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), in respect of expenses incurred in sewering, channelling, &c., a street, called Wilton Road, within the respondents' district.

At the hearing of the complaint the following material facts were proved or admitted:—

The Private Street Works Act, 1892, had been adopted by the respondents. Wilton Road was a "street" within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the appellant was the owner of premises abutting on it. The respondents, acting in pursuance of s. 6 of the Private Street Works Act, 1892, being dissatisfied with the state and condition of the street, resolved that the same should be sewered, levelled, paved, metalled, flagged, channelled, and made good. The specification, plans, sections, estimate, and provisional apportionments required by s. 6 were made, approved, and deposited, and copies thereof were duly served on the owners of the premises liable to be charged. The works were executed to the satisfaction of the respondents under a contract made between them and a contractor, who had tendered to execute the works for a named sum and extras, in accordance with a specification, plans, and an estimate of the cost prepared by the respondents' surveyor, and according to general conditions contained in the contract. The respondents paid the named sum, together with sums for extras, to the contractor. They came to be satisfied with the works on the report of their surveyor, and production of certificates for payment given by him from time to time to the contractor, and on the surveyor's final report and certificate on the completion of the works. The surveyor inspected the works from time to time whilst the same were in progress, and when the same were finally completed satisfied himself by personal inspection that the same had been completed in accordance with the terms of the contract, and he accordingly gave his certificate to the contractor for the payment to him of the balance due under the contract, and reported the due completion of the works to the respondents, who directed payment to the contractor of the balance so certified to be due, and that final payment was made accordingly. On April 15, 1901, the surveyor finally apportioned the cost among the frontagers. The amount apportioned upon the appellant was the amount sought to be recovered by the respondents, and notice thereof was, on April 19, 1901, duly served upon him. The appellant did not within one month after the date of that notice object to the final apportionment on any of the grounds set forth in s. 12 of the Private Street Works Act, 1892 (1), nor did he raise any objection thereto until July 22, 1901, when his solicitor wrote on his behalf a letter to the respondents, giving notice of objection in the following terms:—

"I hereby give you notice that I consider the apportionment of the expenses of making up Wilton Road made by your surveyor invalid. Such apportionment should only be made when the work is complete, and from evidence obtained at the inspection made on 24th June last it is manifest that the road has not been formed and levelled, nor has it been ballasted with six inches of hard Ventnor rubble or white chalk, nor metalled with six inches best yellow gravel, nor have the footways been ballasted four inches thick, nor metalled with three inches fine St. George's down gravel. Also the channelling

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(1) Sect. 12: "(1.) When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be), and such final apportionment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act, . . ."

"(2.) Within one month after such notice the owner of any premises charged with any expenses under such apportionment may, by a written notice to the urban authority, object to such final apportionment on the following grounds, or any of them:—

"(*a*) That the actual expenses have without sufficient reason exceeded the estimated expenses by more than fifteen per cent.

"(*b*) That the final apportionment has not been made in accordance with this section.

"(*c*) That there has been an unreasonable departure from the specification, plans, and sections."

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and kerbing does not comply with the specifications submitted and forming the basis of notice to frontagers. Mr. Hayles will therefore contest your right to recover payment from him, the Act requiring that the works shall be complete before the surveyor proceeds to make up his apportionment. It will be contended that it is equally necessary that the work should be complete in thickness as that it should be complete in width and length."

The appellant, on the hearing of the complaint, substantially raised the same objections, and he desired to cross-examine the respondents' surveyor, and to call evidence, in support of the contention that the works had been only partially completed, but was not permitted to do so.

The justices were of opinion that the final apportionment, not having been objected to in manner provided by the Act, was conclusive against the appellant, and they accordingly ordered him to pay to the respondents the sum claimed, with interest thereon and a sum for costs.

The questions for the opinion of the Court were—(1.) whether the justices were right in declining to allow the appellant to cross-examine and produce evidence in support of his contention; (2.) whether, having regard to the nature of the appellant's contention, it was necessary for him to give notice of objection in the manner and within the time required by the Act; and (3.) whether the final apportionment was made in accordance with the Act.

Montagu Lush, K.C. (*C. H. Marriott* with him), for the appellant. The justices arrived at a wrong conclusion. Sect. 12 of the Private Street Works Act, 1892, makes the completion of the works a condition precedent to the right of the surveyor to make a final apportionment, and the appellant was entitled to shew before the justices that the works had not been completed, and therefore that the final apportionment was bad. The Public Health Act, 1875, contains no power to make provisional apportionments, but it gives a right of appeal to the Local Government Board, and no such right is given by the Private Street Works Act, 1892. In *Cook* v. *Ipswich*

Local Board (1), decided under the Public Health Act, 1848 (11 & 12 Vict. c. 63), the Court decided that the justices had no jurisdiction to go behind the second apportionment and inquire into the questions whether the amount had been actually expended and whether the plans and specification had been departed from; but the reason given for that decision was that the Act of 1848, as amended by a subsequent Act, gave an appeal to the Secretary of State. The first apportionment in that case was held to be a nullity. The objection taken by the appellant here could not have been taken under s. 12 of the Act. That objection was that the works shewn by the specification and plans had not been completed, and, if that be so, the final apportionment was a nullity.

Macmorran, K.C., and *C. Fleetwood Pritchard*, for the respondents, were not heard.

LORD ALVERSTONE C.J. I am of opinion that our judgment should be for the respondents. In *Cook* v. *Ipswich Local Board* (1) the Court of Queen's Bench decided that the validity of an apportionment of the expenses of paving, &c., a street, made under s. 69 of the Public Health Act, 1848, could not in proceedings before justices be questioned on the grounds that the works done by the local board differed from the works shewn on the plans, and that the money said to have been expended on the street had not in fact been expended. During the discussion of the case it was pointed out by Cockburn C.J. and Blackburn J. that the only remedy in such a case was by an appeal to the Secretary of State under the provisions of that Act as amended by a subsequent Act. The Public Health Act, 1875, contains similar provisions with respect to the paving, &c., of streets which are not highways repairable by the inhabitants at large, and gives an appeal to the Local Government Board where a local authority are empowered to recover in a summary manner expenses incurred by them. Then came the Private Street Works Act, 1892, which gives to frontagers, who are sought to be made liable under the Act for expenses of private street works, valuable rights and protection which they had not before that Act was passed. They can, during one month after the approved plans, specifications, estimates, and provisional apportionment have been deposited under s. 6, object to the proposals of the urban authority on any of the grounds set forth in s. 7, and their objections can be heard and determined by a Court of summary jurisdiction. Frontagers are thus given valuable rights of objection, which, except the right to object that the street in question was not a highway repairable by the inhabitants at large, they did not possess before the Act was passed. Further, the Act gives them the power of raising special points of objection after the work has been completed. By s. 12, within one month after a frontager has received notice of the final apportionment, he may, by a written notice to the urban authority, object to that apportionment on the grounds that the actual expenses have without sufficient reason exceeded the estimated expenses by more than 15 per cent.; that the final apportionment has not been made in accordance with s. 12, and that there has been an unreasonable departure from the specification, plans, and sections. If any one of those grounds of objection be made good, the Court of summary jurisdiction may correct the figures and, in effect, make a fresh apportionment. The appellant here did not take the course pointed out by s. 12. It was contended for him that he could not take that course, because the question he desired to raise could not be raised under s. 12. It was also said that the final apportionment could only be made when the private street works had been completed, and that, if they had not been completed, there must be a right of questioning the validity of the apportionment on proceedings taken against him before a Court of summary jurisdiction. A person in the position of the appellant certainly had no such right before the Act of 1892 was passed, although he might have appealed to the Local Government Board. Looking at the complaints which are made on behalf of the appellant in the letter written by his solicitor, I think, speaking for myself, it is impossible to say that he could not have raised them under s. 12. I dissent from the argument that he had no remedy or right in respect of the points indicated in the letter; I think he could have raised them all. Assuming that he could not, the facts found in the case, so far from indicating that the works had not been completed, shew that they had been completed to the satisfaction of the respondents. The case finds that the surveyor from time to time inspected the works, which were executed by a contractor under a contract with the respondents, whilst they were in progress, and had from time to time given certificates for payments on account, and when the works were completed satisfied himself by personal inspection that they had been completed according to the contract; that he accordingly gave his certificate to the contractor for the payment to him of the balance due under the contract, and reported the due completion of the works to the respondents, who paid the balance so certified to be due. Therefore, assuming that the matters of which the appellant complains were matters of which he could not have complained under s. 12, his suggestion obviously must be that the surveyor was guilty of negligence or improper conduct. There is nothing in the Act to give the frontager a new remedy—viz., the right to raise the question of negligence or improper conduct of the surveyor as an answer to proceedings for the recovery of the sum apportioned upon him. It is impossible to say that, under such circumstances as these, the frontager may dispute, after the certificate of the due completion of the works, the final apportionment which is made conclusive for all purposes. I do not by any means consider that by adopting this Act a local authority deprives the ratepayers of the district of any rights or powers. It is true that the Act does not give any appeal to the Local Government Board, but other valuable rights and powers are given in substitution. On these grounds I am of opinion that the justices' decision was right.

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(1) (1871) L. R. 6 Q. B. 451.

WILLS J. I am of the same opinion.

CHANNELL J. I agree. It is quite probable that the appellant had a remedy under s. 12 if within one month from the notice of final apportionment he had made objection on the grounds specified in sub-s. 2, clauses (*b*) and (*c*). But, assuming

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that he had not a remedy under s. 12, I think the true result is that he had no remedy at all. To my mind it is not unreasonable that he should have none. If these had been works the cost of which had been chargeable to the ratepayers generally and not to private owners, and if by collusion or negligence in the performance of his duty the surveyor had given wrong certificates with respect to the sums due for the execution of the works, could the ratepayers of the district have questioned the rate out of which those sums were paid? Clearly they could not. The Act assumes that the surveyor will act rightly in the performance of his duties. I think that the appellant is in no better position in this matter than an ordinary ratepayer against whom proceedings before justices are taken to obtain payment of a rate made to pay for works done at the cost of the ratepayers.

Judgment for the respondents.

Solicitors for appellant: *Needham, Tycr & Barrow, for John Marsh, Shanklin.*

Solicitors for respondents: *Wood, Bigg & Nash, for W. H. Woolridge, Sandown.*

W. A.

THE GUARDIANS OF THE POOR OF PLYMOUTH, APPELLANTS; GIBBS, RESPONDENT.

1902
Oct. 30.

Bastardy—Jurisdiction of Justices—Illegitimate Child "chargeable" to Parish —Cost of Relief—Marriage of Mother—Application by Guardians against Putative Father, where Husband able to maintain Child—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 57—*Bastardy Laws Amendment Act*, 1873 (36 *&* 37 *Vict. c.* 9), *s.* 5.

Where an illegitimate child is being maintained by the guardians of a union or parish, justices have jurisdiction, upon the application of the guardians, to make an affiliation order against the putative father of the child under s. 5 of the Bastardy Laws Amendment Act, 1873, notwithstanding that the child's mother has married and her husband is able to maintain it.

CASE stated, under the Summary Jurisdiction Acts, by two justices of the borough of Plymouth.

In March, 1902, the respondent appeared before the justices, on a summons issued upon the application of the appellants, who were the guardians of the poor of the town of Plymouth, to shew cause why an order should not be made upon him to contribute towards the relief of a bastard child of one Florence Payne, which child had become chargeable to the town of Plymouth, and of which child the respondent was alleged to be the putative father. (1)

The following material facts were proved or admitted at the hearing before the justices:—

On December 16, 1898, Florence Saxey, a single woman then residing in the town of Plymouth, was delivered of a bastard child, of whom the respondent was the father.

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(1) The Bastardy Laws Amendment Act, 1873 (36 & 37 Vict. c. 9), s. 5, provides: "When a bastard child becomes chargeable to a union or parish, the guardians may apply to two justices having jurisdiction in the union or parish, in petty sessions, and thereupon such justices may summon the man alleged to be the father of the child to appear before any two justices having the like jurisdiction, to shew cause why an order should not be made upon him to contribute towards the relief of the child, and upon his appearance . . . . the justices . . . . may adjudge the man to be the putative father of such bastard child, and they may proceed to make an order upon such putative father to pay to the guardians . . . . such sum, weekly or otherwise, towards the relief of the child during such time as the child shall continue or afterwards be chargeable, as shall appear to them to be proper . . . ."

On April 5, 1901, Florence Saxey was married to George Payne, a stableman residing in the same town. Three months after their marriage George Payne left his wife. Their home was broken up, and the child was left with Florence Payne's mother, who was unable to maintain it, and on July 16, 1901, the child was taken to the workhouse, and there maintained by the appellants, and was still being so maintained at the time of the hearing. George Payne was of sufficient ability to maintain the child. At the time of the hearing he had resumed cohabitation with his wife, but he refused to take the child out of the workhouse and maintain it.

The justices dismissed the summons, being of opinion that the child had not become "chargeable" to the union within s. 5 of the Bastardy Laws Amendment Act, 1873; that George Payne, as the husband of Florence Payne, was primarily liable for the maintenance of his wife's bastard child, and that the appellants were not entitled to an order against the respondent to contribute to its maintenance, so long as George Payne was of ability to maintain the child.

If the Court should be of opinion that the justices were right in their decision, then the summons was to stand dismissed. If the Court should be of the contrary opinion, then the case was to be remitted to the justices with the opinion of the Court thereon.

Garland, for the appellants. The justices came to a wrong conclusion. The child here became "chargeable" to the union within the meaning of s. 5 of the Bastardy Laws Amendment Act, 1873. The justices considered themselves bound by the decision in *Lang* v. *Spicer* (1); but it does not apply to this case. By 18 Eliz. c. 3, as amended by 49 Geo. 3, c. 68, justices had power to charge the mother or reputed father of a bastard child with the payment of money for the maintenance of the child for the relief of the parish. By 4 & 5 Will. 4, c. 76, s. 57, the husband of a woman who has borne an illegitimate child

(1) (1836) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

before marriage "shall be made liable to maintain such . . . . child as a part of his family, and shall be chargeable with all relief . . . . granted to or on account of such child . . . . until such child . . . . shall attain the age of sixteen years . . . . and such child . . . . shall, for the purposes of this Act, be deemed a part of such husband's family accordingly." *Lang* v. *Spicer* (1) only decided that, by virtue of that Act, the putative father of the child was not liable upon an order of justices for the maintenance of the child in relief of the parish, at any rate so long as the husband was of ability to maintain it. By s. 71 of the same Act the liability to maintain an illegitimate child was thrown on the mother so long as she was unmarried or a widow, and all relief granted to the child was to be considered as granted to the mother. By s. 72, where the mother was unable to provide for the maintenance of the child, and it became chargeable to the parish, the Court of quarter sessions might, upon the application of the overseers or guardians, make an order on the putative father for its support. The 7 & 8 Vict. c. 101 provided that from and after the passing of the Act all powers for obtaining or making an order upon any putative father for the maintenance of a bastard child should cease and determine, except as thereinafter appearing, and also provided that an order for the maintenance of the child might be made upon the putative father upon the application of the mother if she was a single woman, and that money paid under the order should be paid to her. The statute also gave power to the guardians, in case of the death or incapacity of a mother who had obtained an order against the putative father, to make application before justices for the enforcement of that order. The Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), re-enacted the power to make an order upon the putative father upon the application of the mother, and for her benefit, and by s. 8 enabled for the first time guardians to obtain an order against the putative father where a bastard child became "chargeable" to a union or parish. Those provisions are substantially re-enacted by s. 5 of the Bastardy Laws Amendment Act, 1873, under which section the question raised in this case arises. Having regard to the previous legislation, the word "chargeable" in s. 5 must be taken to have its ordinary meaning. It means "chargeable in fact"; it does not mean chargeable by reason of the fact, where the mother of the child has married, that the husband cannot pay for its maintenance. A child becomes chargeable when it is in fact being maintained by the parish. The liability of the husband is cumulative and not alternative. The third proviso to s. 5, which provides that "nothing in this section shall be deemed to relieve the mother of a bastard child from her liability to maintain such child," shews the Legislature contemplated that the guardians might obtain an order against the putative father although there was someone else liable to maintain the child. The Vagrancy Act of 1824 (5 Geo. 4, c. 83), s. 3, shews that the Legislature there contemplated that a child might become "chargeable" to a parish although its father was able to maintain it, and the term "chargeable" is used in the same sense in 4 & 5 Will. 4, c. 76, and 7 & 8 Vict. c. 101. The Bastardy Laws Amendment Act, 1873, was passed with the full knowledge of the decision in *Lang* v. *Spicer* (1) and the previous legislation on the subject, and the intention was to throw an additional liability on the putative father of an illegitimate child.

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(1) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

J. A. Hawke, for the respondent. The justices' decision was right. The husband is under a legal liability to maintain his wife's illegitimate child as part of his family under 4 & 5 Will. 4, c. 76; and so long as he is of ability to maintain it the guardians cannot obtain any order against the putative father for its maintenance. The child does not become "chargeable" to the union until the husband is unable to maintain it. *Lang* v. *Spicer* (1) is an authority for that proposition. Lord Abinger C.B. (2) rested his judgment on the fact that there was "a primary provision for the child by the charge which is now thrown upon the husband"; and Parke B. pointed out that it was not intended that the putative father and the husband should both be liable. In *Stacey* v. *Lintell* (1) *Lang* v. *Spicer* (2) was referred to in the judgment of Mellor J., and the reasoning of the judgments delivered in that case was applied. *Hardy* v. *Atherton* (3) does not touch the point raised in this case. The decision was that an order obtained against the putative father whilst the mother was a single woman could be enforced against him after her marriage, although her husband was able to maintain the child. But Hawkins J. in his judgment said (4): "As between the parish and the husband, no doubt he is liable to maintain the child as part of his family, under the 57th section of 4 & 5 Will. 4, c. 76, and so long as he is of ability so to maintain it, the child cannot legally become chargeable upon the parish." The term "chargeable" in s. 5 of the Bastardy Laws Amendment Act, 1873, means chargeable by reason of there being no person liable and of ability to maintain the child. The Legislature cannot have intended that there should be a joint or dual liability on the putative father and the husband: see *Lang* v. *Spicer* (5), judgment of Parke B.; *Stacey* v. *Lintell* (6), judgment of Mellor J.; *Peatfield* v. *Childs*. (7) By 5 Geo. 4, c. 83, a husband is rendered liable to imprisonment as a rogue and vagabond if he does not maintain his family, including his wife's illegitimate children. [He also referred to *Davies* v. *Evans* (8) and *Jones* v. *Davies*. (9)]

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(1) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

(2) 5 L. J. (M.C.) 60, at p. 62.

Garland replied.

LORD ALVERSTONE C.J. The question raised in this case is one of difficulty, involving, as it does, a consideration of the rights of guardians of the poor in respect of two persons. In order to decide the question, I think the safest thing is to consider first the language of the Act, and then to see whether such circumstances exist as to compel us to give any other than the plain interpretation to that language. It appears that up

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(1) (1879) 4 Q. B. D. 291.

(2) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

(3) (1881) 7 Q. B. D. 264.

(4) 7 Q. B. D. at p. 267.

(5) 1 M. & W. 129, at p. 135.

(6) 4 Q. B. D. 291, at p. 294.

(7) (1899) 63 J. P. 117.

(8) (1882) 9 Q. B. D. 238.

(9) [1901] 1 K. B. 118.

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to the year 1872 there had been no direct power for guardians to obtain an order against the putative father of a bastard child, though they had an indirect power of enforcing orders obtained by the mother against the putative father, and that notwithstanding that the mother had married since the birth of the child. By the Bastardy Laws Amendment Act, 1872, there was for the first time given to guardians a direct power of obtaining an order against the putative father of a bastard child who had become chargeable to a union or parish, and the Bastardy Laws Amendment Act, 1873, contains, with some minor amendments, practically the same provision. Sect. 5 provides: "When a bastard child becomes chargeable to a union or parish, the guardians may apply to two justices having jurisdiction in the union or parish, in petty sessions, and thereupon the justices may summon the man alleged to be the father of the child to appear before any two justices having the same jurisdiction, to shew cause why an order should not be made upon him to contribute towards the relief of the child," &c. It was contended for the respondent that, because, under the statute 4 & 5 Will. 4, c. 76, there is an obligation upon a woman's husband to maintain her illegitimate children as part of his family, the power of the guardians to obtain orders against the putative father must be limited to cases in which the husband is not in a position to maintain those children. That statement of the argument seems to give an answer to the main contention put forward, which must be that the word "chargeable" means "ultimately chargeable"—that is to say, that the statute is only meant to apply to illegitimate children who, in consequence of the inability of some other person to maintain them, will become chargeable to a union or parish. If the statute had intended to deal only with those cases, one would have expected it to say so in terms. Primâ facie, the natural construction is that "chargeable" means chargeable in fact. I think that is the plain interpretation of the language used, and that the cases intended to be dealt with are all cases in which a child becomes in fact chargeable to the union or parish. Some sanction to this view is given by the third proviso to s. 5, which provides that "nothing in this section shall be deemed to relieve the mother of a bastard child from her liability to maintain such child." If the child becomes "chargeable" within the meaning of s. 5, the justices may summon the man alleged to be the father to appear and shew cause why an order should not be made upon him; and having heard the evidence of the mother, corroborated as the section provides, and of others, they may—I do not say they must—make an order against the putative father. It is not, I think, an unfair way of stating the argument for the respondent to say that it does not give to the word "chargeable" its proper or ordinary meaning, but makes it refer to the ultimate fact that the husband is not able to maintain the child. I therefore come to the conclusion that the justices may, upon the application of the guardians, make an order against the putative father notwithstanding it be shewn that the husband of the illegitimate child's mother has means to maintain it, though the justices may take that fact into their consideration. The difficulty suggested as to the dual liability of the putative father and the husband has been discussed in several cases; but it was decided in *Hardy* v. *Atherton* (1) that an order against the putative father obtained by the mother could be enforced notwithstanding that she had since married, and her husband had means to support her illegitimate child. The argument that a dual liability may exist applies with equal force to the present case, where the application for an order against the putative father is made by the guardians. I think that *Lang* v. *Spicer* (2) was rightly decided as the law then stood. The decision was that, there being a person, the woman's husband, liable by statute to maintain the child, the putative father could not be made liable upon an affiliation order obtained for the relief of the parish—at any rate, so long as the husband was able to maintain the child. It was held that, either expressly or by implication, the provisions of 18 Eliz. c. 3 had been repealed; but in 1872 and 1873 there was a re-enactment of the legislation which had been so repealed, and s. 5 of the Act of 1873, giving the guardians specific power to obtain an

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(1) 7 Q. B. D. 264.
(2) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

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order against the putative father, was passed with knowledge of the previous legislation and of the decision in *Lang* v. *Spicer.* (1) If it had been meant to give the strained meaning contended for to the word "chargeable," I think different language would have been used. I am of opinion that the case must go back to the justices with our direction that they have jurisdiction to make the order against the putative father, but pointing out that they are not bound to make it.

WILLS and CHANNELL JJ. were of the same opinion.

Judgment for the appellants. Case sent back.

Solicitors for appellants: *Crowders, Vizard & Oldham, for William Adams, Plymouth.*

Solicitors for respondent: *Law & Worssam, for Bond & Pearce, Plymouth.*

W. A.

C. A.

1902

Dec. 1.

[IN THE COURT OF APPEAL.]

HARRISON *v.* ALLIANCE ASSURANCE COMPANY, LIMITED.

Practice—Life Insurance Company—Lost Policy—Payment into Court—No sufficient Discharge otherwise obtainable—Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 *Vict. c.* 8), *s.* 3—*Order* LIV. (*c*).

Where an action was brought against a life insurance company upon a life policy which had been lost, and the directors of the company were of opinion that no sufficient discharge could otherwise be obtained:—

Held, that the provisions of the Life Assurance Companies (Payment into Court) Act, 1896, were applicable, and therefore leave should be given to the defendants to pay the amount of the policy into the High Court under Order LIV. (*c*), r. 3.

APPEAL from an order of Darling J. at chambers, giving leave to the defendants to pay the money payable by them under a policy of life insurance into the High Court under the Life Assurance Companies (Payment into Court) Act, 1896.

The policy was effected with the defendants in 1875 upon

(1) 1 M. & W. 129; 5 L. J. (M.C.) 60; 46 R. R. 290.

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the life of the Rev. William Cambourne Paynter by one Henry Prince, who died shortly afterwards, and in respect of whose estate letters of administration were granted to his widow in April, 1875. By a deed of family arrangement dated August 11, 1875, the policy had been assigned upon certain trusts to trustees, of whom the plaintiff was the last survivor. Notice of this assignment was given to the defendants in 1882. Paynter died in September, 1901, and an action was thereupon commenced against the defendants upon the policy. It appeared that many years before the commencement of the action the policy had been lost, of which loss notice had been given to the defendants. The premiums on the policy had been duly paid by the trustees till the death of Paynter. The defendants had offered to pay the money payable under the policy to the plaintiff upon having an indemnity, but the parties had not been able to agree as to the terms of the indemnity. The defendants applied at chambers for leave to pay the amount of the policy into the High Court under the Life Assurance Companies (Payment into Court) Act, 1896, s. 3, upon an affidavit stating that in the opinion of their board of directors no sufficient discharge could otherwise be obtained. (1) The learned judge granted the application.

Disturnal, for the plaintiff. Leave to pay the money payable under the policy into court under the Act ought not to be given under Order LIV. (*c*), r. 3, unless there is a reasonable opinion on the part of the board of directors, founded on substantial grounds, that no sufficient discharge can otherwise be obtained.

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(1) By the Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict. c. 8), s. 3, "Subject to rules of Court, any life assurance company may pay into the High Court, or, where the head office of the company is situated within the jurisdiction of the Chancery Court of the County Palatine of Lancaster, either into that court or into the High Court, any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained."

By Order LIV. (*c*), r. 3, "No payment shall be made into court under the Act, where any action to which the company is a party is pending in relation to the policy or the moneys thereby assured, except by leave of the judge to be obtained by summons in the action."

It is submitted that in this case such an opinion on the part of the directors is not reasonable. The policy has been lost many years; the trustees have been duly paying the premiums ever since; and the policy money was payable as long ago as September, 1901. No notice having been given to the defendants of any mortgage, or any assignment of the policy other than that of 1875, or of any other claim upon it besides the plaintiff's, after such a lapse of time, there could be no real risk under the circumstances in paying the money to the plaintiff. The defendants would be fully protected by the provisions of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3. The effect of a payment into court under the Life Assurance Companies (Payment into Court) Act, 1896, is that the plaintiff has under Order LIV. (*c*), r. 5, to embark upon an independent litigation by way of petition or summons in the Chancery Division for payment of the fund out of court to him, which would involve expense and delay. He ought not to be compelled to do this where there is really no occasion for it.

Whately, for the defendants. The Act entitles the company to the protection thereby given in any case in which the board of directors are of opinion that no sufficient discharge for the money payable under the policy can otherwise be obtained. Assuming for the moment that the directors of the defendant company were, as the plaintiff alleges, acting unreasonably, the plaintiff is amply protected from being thereby prejudiced, and would, no doubt, if the justice of the case required it, get all the costs to which he might have been put. Provisions are made by rules 1 (*d*) and 7 of Order LIV. (*c*), from which it appears that in that case the defendants might be made to pay any costs which the Court or judge might consider they ought under the circumstances to pay. By the plain words of the Act the sole condition upon which the right to pay the money into court arises is that, in the opinion of the board of directors, no sufficient discharge can otherwise be obtained. The Court cannot read words into the section qualifying that right. It is submitted that the protection given by the Act is applicable to a case where a policy has been lost as well as to any other case where a difficulty may arise in getting a sufficient discharge for the policy money. It may be that the risk to the company would not be very great in such a case as this, but it cannot be said that there is no doubt about the plaintiff's title. If the defendants paid the plaintiff the amount payable on the policy, a person might come forward afterwards with the policy and swear that years ago he gave notice to the defendants of an assignment of the policy, and it might not be easy for them to prove a negative. It is not unreasonable in such a case for the company to make themselves quite safe by taking advantage of the protection given by the Act; but, even if it were otherwise, the plaintiff is not prejudiced, for the company may be ordered to pay the plaintiff's costs if, in the result, it be thought that they have acted unreasonably.

Disturnal, for the plaintiff, in reply. The Act was not intended to meet the case of possible rival claims to the money payable under the policy. In such a case the defendants could interplead. The kind of case contemplated by the Act is one in which a person entitled to the policy money is subject to some disability, and therefore there is no one competent to give a discharge.

COLLINS M.R. I am of opinion that this appeal should be dismissed. It seems to me that the defendants have brought themselves precisely within the terms of the Life Assurance Companies (Payment into Court) Act, 1896, s. 3. It is provided by that Act that, subject to rules of Court, any life assurance company may pay into the High Court any moneys payable by them under a life policy "in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained." Unquestionably the case is brought within the latter words of the section, for it is distinctly stated in the affidavit filed on behalf of the defendants that their board of directors are of opinion that no sufficient discharge can be obtained in this case otherwise than by proceeding under the Act; and there is, it seems to me, clearly ground for that opinion; for, although there may be, under the circumstances, a strong presumption that the plaintiff has a good

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title to the money payable under the policy, I do not think it can be said that his title is absolutely free from doubt. This appears to me to be one of the kind of doubts for the purpose of meeting which the Act in relief of insurance companies was passed. It must be borne in mind that the defendants, in seeking the protection of the Act, do so at the risk of having to pay any costs to which the plaintiff may, in consequence, be put, if their own attitude has been in any way unreasonable. If the plaintiff's title to the policy money be as clear as his counsel alleges it to be, then no doubt such order will hereafter be made against the defendants with regard to the plaintiff's costs as justice to him may require. So the result would in that case be that the defendants would obtain the protection they want, but no injustice would be done to the plaintiff. On the other hand, if the plaintiff's title to the money be not so clear, then there seems to be no reason why the defendants should be debarred from obtaining the protection, which it apparently was the object of the Legislature to give to insurance companies in such cases. On these grounds I think the order of the learned judge was right.

MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Church, Rendell & Co.*
Solicitors for defendants: *Powell & Burt.*

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 15.

IN THE MATTER OF BAKER, LEES & CO.

Practice—Solicitor—Parliamentary Agent—Costs—Taxation—Costs of obtaining Private Act of Parliament—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*House of Commons Costs Taxation Act,* 1847 (10 & 11 *Vict. c.* 69)—*House of Lords Costs Taxation Act,* 1849 (12 & 13 *Vict. c.* 78).

Where a bill of costs delivered by a parliamentary agent, who is likewise a solicitor, relates exclusively to business done by him in the capacity of a parliamentary agent, and not in that of a solicitor, the bill cannot be referred for taxation under the Solicitors Act, 1843.

APPEAL from an order of Ridley J. at chambers, by which a bill of costs delivered by the appellants to the respondent was referred to a master for taxation.

It appeared from the affidavit of the appellants, who were solicitors and parliamentary agents, that they had been instructed in 1901 by the respondent, on behalf of himself and others, to promote a bill in the ensuing session of Parliament, called the Mexborough and Swinton Tramways Bill (1), which bill was subsequently passed: that, on receiving those instructions, they advised how the desired powers could be obtained, and prepared the necessary bill, and the costs, charges, and expenses, for which they claimed to charge, were costs, charges, and expenses in respect of the proceedings in the Houses of Parliament relating to the petition for the bill, or the bill, or in respect of complying with the standing orders of the said Houses relative thereto, or in preparing, bringing in, and carrying the same through; and that their bill of costs related wholly to work done and expenses incurred by them as parliamentary agents, and which were properly taxable under the House of Commons Costs Taxation Act, 1847. (2) Upon

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(1) A similar question was involved with regard to the costs of the promotion of two other bills, but it has not been thought desirable to complicate the matter by reference to these.

(2) By s. 10 of the House of Lords Costs Taxation Act, 1849, provision is made for the taxation either by the House of Lords taxing officer or the House of Commons taxing officer, as the

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an application by the respondent at chambers for a reference of the appellants' bill of costs for taxation under the Solicitors Act, 1843, s. 37, the master refused to make an order, but on appeal Ridley J. reversed his decision, and ordered that the bill should be so referred.

Danckwerts, K.C., and *Vesey Knox*, for the appellants. The bill of costs in this case including only charges for work done, and disbursements made, by the appellants acting merely as parliamentary agents, and not as solicitors, there is no jurisdiction to refer it for taxation under the Solicitors Act, 1843, s. 37. Provisions already existed at the date of that Act for the taxation of such a bill, as regards proceedings in the House of Commons, by virtue of the 6 Geo. 4, c. 123, and, as regards proceedings in the House of Lords, by virtue of the 7 & 8 Geo. 4, c. 64. The provisions of those Acts, and the machinery thereby provided for taxation, were inconsistent with the application of the Solicitors Act, 1843, to such bills, and, therefore, the latter Act cannot be read as applicable to them. The Acts of George IV. are now repealed, but similar provisions were enacted, with regard to the House of Commons, by the House of Commons Costs Taxation Act, 1847, and, with regard to the House of Lords, by the House of Lords Costs Taxation Act, 1849. The appellants contend, first, that those Acts providing specially with regard to the taxation of costs such as these in a manner inconsistent with the provisions of the Solicitors Act, 1843, that Act cannot be construed as giving jurisdiction to the Supreme Court to order taxation of such costs; and, secondly, that, the business to which the items of this bill exclusively relate having been done by the appellants, not as solicitors, but merely as parliamentary agents, the bill cannot be referred for taxation as a solicitor's bill under the Solicitors Act, 1843. There may, no doubt, be cases in which a solicitor, having chosen to deliver a mixed bill, i.e., a bill in which items in respect of work done by him as a solicitor are mixed up with

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case may be, of costs of proceedings in the other House included in a bill of costs. In the case in question the appellants' bill of costs had been lodged with the House of Commons taxing officer for taxation.

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items in respect of work not necessarily so done, has by such action submitted himself to taxation of the whole as a solicitor's bill, or raised against himself an inference that he did the whole of the work included in the bill quâ solicitor. It is not necessary for the appellants to dispute the proposition that in such a case taxation might be ordered under the Solicitors Act, 1843.

The House of Commons Costs Taxation Act, 1847, in substance provides that no action shall be brought by a person acting as a parliamentary agent for costs, charges, and expenses in respect of proceedings in relation to private bills, until one month after delivery of his bill of costs, and that such bills of costs may be taxed by a taxing officer to be appointed by the Speaker; and by s. 8 it is provided that any person, upon whom a demand for any such costs shall be made, may have the bill taxed upon application by him before the expiration of six months after the delivery of the bill, provided that, after that period, the Speaker may, if he thinks fit, on receiving a report of special circumstances from the taxing officer, direct the bill to be taxed. Sect. 9 gives an appeal from the taxation of the taxing officer to the Speaker, and provides that the Speaker's certificate as to the amount due for costs shall be binding and conclusive on the parties, and shall have the effect of a warrant of attorney to confess judgment for the same.

The provisions of the House of Lords Costs Taxation Act, 1849, are similar, with the exception that the Clerk of the Parliaments or clerk assistant is to perform the functions which, in the case of the House of Commons, the Speaker performs under the House of Commons Costs Taxation Act, 1847. Sect. 12 of the Act of 1849 appears to contemplate the case of such a mixed bill of costs as has been before referred to. The machinery of those Acts is quite incompatible with that given by the Solicitors Act, 1843, and the greatest inconsistencies and inconveniences might arise if they were held to be concurrently applicable. For instance, a different limit of time within which taxation may be applied for is given by the Solicitors Act, 1843, s. 37, from that given by the Acts with regard to parliamentary taxation, the period being twelve months in one case and six in the other. In the case of the latter Acts the certificates of the Speaker and of the Clerk of Parliaments respectively are final and conclusive, and operate as warrants of attorney to confess judgment, whereas under the Solicitors Act, 1843, there may be appeals up to the House of Lords. There are also other inconsistencies between the two sets of provisions.

[They cited on this point *Daw* v. *Metropolitan Board of Works* (1); *O'Flaherty* v. *M'Dowell.* (2)]

The fact that the appellants are solicitors, as well as parliamentary agents, is an accident, and it does not follow, therefore, that they necessarily act as solicitors in respect of work which they do as parliamentary agents. There are parliamentary agents, who are not solicitors, and, with respect to their bills, the only provisions for taxation applicable are those of the House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849. The true test for determination of the question whether a bill of costs is taxable under the Solicitors Act, 1843, is laid down in *Allen* v. *Aldridge.* (3) In the case of *In re Sudlow* (4) the solicitors really assented to taxation of their bill provided it was taxed on the parliamentary scale. Cases such as *In re Strother* (5) are really cases in which a mixed bill had been delivered, including charges for work done by the respondent as a solicitor.

[They also cited *In re Oliver* (6); *In re Osborne* (7); *In re Jones.* (8)]

Warrington, K.C., and *Tudor Howell*, for the respondent. Taking the second point made for the appellants first, it is submitted that a solicitor who does work as a parliamentary agent is doing work which is undoubtedly solicitor's work. A man may, it is true, do parliamentary agent's work, though he is not a solicitor, or qualified as such, but it does not follow from that that a solicitor employed by a client to act as a parliamentary agent for him is not acting as a solicitor. The House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849, both speak in the preamble of "costs and expenses to be charged by parliamentary agents, attornies, solicitors, and others in future sessions of Parliament in respect of bills subject to the payment of fees in Parliament, commonly called private bills," thereby shewing that they recognise it as part of the proper work of solicitors to act as parliamentary agents in relation to such proceedings in Parliament. When the Solicitors Act, 1843, was passed, the provisions of the Acts of George IV. with regard to parliamentary costs were in force, but there is no exception made in the Solicitors Act, 1843, such as one would expect to find, if it were intended to except from its operation the costs of solicitors in respect of parliamentary matters. Sect. 12 of the House of Lords Costs Taxation Act, 1849, really assumes that there is jurisdiction to tax such bills as this under the Solicitors Act, 1843, for it provides that the taxing officer of the House of Lords, or of the House of Commons, as the case may be, shall assist the officer of any Court who has to tax with regard to any costs, charges, and expenses incurred in respect of a private bill. This shews that the fact that the work done by a solicitor is that of a parliamentary agent does not oust the jurisdiction to order taxation of his charges in respect of the work under the Solicitors Act, 1843. *In re Strother* (1) and *In re Sudlow* (2) are distinct authorities in the respondent's favour. In *Allen* v. *Aldridge* (3) the solicitor acted only as steward of the manor.

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(1) (1862) 31 L. J. (C.P.) 223.
(2) (1857) 6 H. L. 142.
(3) (1844) 5 Beav. 401.
(4) (1849) 11 Beav. 400.
(5) (1857) 3 K. & J. 518.
(6) (1867) 36 L. J. (Ch.) 261.
(7) (1858) 25 Beav. 353.
(8) (1872) L. R. 13 Eq. 336.

[ROMER L.J. It being admitted that a parliamentary agent need not be a solicitor, it does not appear to follow, from the fact that a parliamentary agent is also a solicitor, that he necessarily acts quâ solicitor in acting as a parliamentary agent. The true rule would seem to be that all the circumstances of the particular case should be considered in order to see whether he really acted in pursuance of the relation of solicitor and client existing between himself and his employer, in which case

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(1) 3 K. & J. 518.

(2) 11 Beav. 400.

(3) 5 Beav. 401.

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taxation of his bill might be directed under the Solicitors Act, 1843, or in some other capacity than that of a solicitor ?]

If the Court is against the respondent on the second point taken by the appellants, it is of no use to argue the first point.

Danckwerts, K.C., was not called upon to reply.

COLLINS M.R. The question which arises in this case is whether the bill of costs of parliamentary agents, who are also solicitors, relating exclusively to their costs as parliamentary agents, is subject to the jurisdiction of the Supreme Court for the purpose of taxation. The master held that it was not, but Ridley J. reversed his decision, and directed that the bill should be referred to a master for taxation. From that decision the present appeal is brought. The contention for the appellants is that, there being special enactments which regulate the taxation of costs in relation to proceedings in Parliament, namely, the House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849, and the terms of these enactments being inconsistent with those of the Solicitors Act, 1843, s. 37, the provisions of that Act cannot be applicable to the taxation of such costs. On looking at those statutes, it certainly does appear that they respectively contain provisions with regard to the taxation of the costs of persons employed to conduct proceedings as parliamentary agents, which differ in most material points from the procedure laid down under the Solicitors Act, 1843. It is not immaterial to observe that, where a person so employed is not a solicitor, but only a parliamentary agent, there is no other mode of taxing his bill but that given by the two statutes to which I have referred. The appellants' counsel went through the provisions of the previous Acts relating to the taxation of parliamentary costs, but they are all really summed up in the provisions of those two Acts, the House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849. By those Acts the certificate of the Speaker in the case of proceedings in the House of Commons, and that of the Clerk of Parliaments in the case of proceedings in the House of Lords, are respectively made final and conclusive, whereas in the case of a taxation under the Solicitors Act, 1843, there may be appeals up to the House of Lords; and there are many other material differences between the provisions of these Acts and those of the Solicitors Act, 1843, as for instance with regard to the limits of time within which an order for taxation may be obtained. The appellants' counsel do not contend that the immunity from taxation by any other means than those given by the before-mentioned statutes with regard to parliamentary costs applies where a bill is delivered by a solicitor, who claims in that bill to make charges in respect of matters other than parliamentary proceedings as well as in respect of such proceedings. It is not disputed that this Court would have jurisdiction to order taxation in such a case; but, in respect of a bill, which consists exclusively of items within the provisions of the Acts relating to parliamentary costs, and which, if the person delivering the bill were not a solicitor, would be taxable only under those Acts, the appellants' counsel contend, and I think rightly contend, that the special jurisdiction given by those Acts must be taken to be, and is, incompatible with the existence, as regards that bill, of the jurisdiction given by the Solicitors Act, 1843, in relation to the taxation of solicitors' costs; and that the circumstance that the person, who has delivered the bill in respect of work done by him as a parliamentary agent, happens also to be a solicitor does not bring the bill within that jurisdiction. That contention appears to me to be sound, as a result of the comparison of the provisions of the Acts with regard to the taxation of parliamentary costs and those of the Solicitors Act, 1843. That being so, it remains for me to consider certain cases, which are said to have established a practice to the contrary. If there were a settled practice in regard to such a matter as the taxation of costs, one might hesitate to interfere with it. But, when one comes to analyze the cases, I think they may all be reconciled by the principle formulated by my brother Romer in the course of the argument; namely that, where the bill of costs relates to work which may be done by a person who is merely a parliamentary agent, and which has been done by a person who is both a parliamentary agent and also a solicitor, one must look closely at the circumstances of the particular case in order to see what in truth was the relation between the parties; and, if one finds on the true view of the facts that the person doing the work was employed to do it merely as a parliamentary agent, and not because he was a solicitor, the work being such as he might have done merely as a parliamentary agent, if he had not been a solicitor, then the mere fact that he happened to be a solicitor does not bring the case within the jurisdiction given by the Solicitors Act, 1843, s. 37; but otherwise the case comes within that jurisdiction. That appears to me to be the true principle which may be derived from the cases. I think that the cases which have been relied upon for the respondent are all distinguishable from the present on that principle; and two of them I think are clearly distinguishable on the facts. The case of *In re Strother* (1), when analyzed, is a very good instance of the application of the principle formulated by my brother Romer, for underlying the whole decision appears to be the fact that the respondent was acting as a solicitor, and apparently some of the items of his bill, though I do not say all, were for work done by him, not as a parliamentary agent, but as a solicitor; the basis upon which the respondent was employed by the petitioners appears to have been the relation of solicitor and client between them, and the respondent had himself employed a parliamentary agent for the purpose of obtaining the bill in Parliament. The relation of solicitor and client between the parties was not ousted by the fact that some of the work done was work which could only be done by a parliamentary agent. The case of *In re Sudlow* (2) cannot be relied on as an authority by the respondent, for there the solicitors were obviously willing to submit to taxation of their bill, though they wished it to be taxed on the parliamentary scale. That case is clearly no authority except to the extent of shewing that, if a person deliberately assents to his position being treated as that of a solicitor, and accepts the liabilities consequent on that position, the inference may fairly be drawn that he was acting as a solicitor, and, when once that inference is drawn, upon the principle which I have before mentioned, the result follows that his bill of costs may be referred for taxation. On these grounds I think the appeal should be allowed.

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(1) 3 K. & J. 518.

(2) 11 Beav. 400.

ROMER L.J. I am of the same opinion. I can very well see that cases of great difficulty may arise under the statutes to which we have been referred, but the circumstances of the case now before us are such as, in my opinion, render it one of no great difficulty. The facts appear to be these. The appellants are parliamentary agents as well as solicitors. They have not been employed by the respondent in respect of the proceedings to which their bill of costs relates otherwise than as parliamentary agents. The items contained in the bill seem to be all charges which might properly be made by them acting merely as parliamentary agents. They have not, so far as appears, been employed by the respondent to act in any capacity other than that of parliamentary agents in connection with any business other than these parliamentary proceedings. We have therefore a case in which there is nothing to shew that the appellants have come under the relation of solicitor and client as between themselves and the respondent; but on the contrary I gather that in this case they have acted for the respondent solely in the capacity of parliamentary agents. That being so, does it follow from the fact that they happen also to be solicitors that their bill is subject to taxation under the Solicitors Act, 1843? In my opinion it does not. I think that their bill must be dealt with under the provisions of the House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849. The true principle upon which the Court ought to deal with such cases appears to me to have been laid down by Lord Langdale M.R. in the case of *Allen* v. *Aldridge*. (1) He there had to consider charges which had been made by a solicitor who had acted as steward of a manor. The facts of the case are not of importance for the present purpose, but, in dealing with them, the Master of the Rolls had to consider the true principle applicable. He began by pointing out that a bill might be subject to taxation, though

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(1) 5 Beav. 401.

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no part of the business to which it related was transacted in any Court. He proceeded to say that, in order that the bill might be taxable, the business to which it related must be business connected with the profession of an attorney or solicitor; and he then indicated in what way it must be so connected. He said: "The statute does not authorize the taxation of every pecuniary demand or bill which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged. The business contained in a taxable bill may be business of which no part was transacted in any Court of law or equity; but I am of opinion that it must be business connected with the profession of an attorney or solicitor—business in which the attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed, if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer." Applying that to the facts of this case, it seems to me that the work done by the appellants does not come within the principle so laid down, which, if I may be permitted to say so, I think was the right and proper principle; and therefore I think that this Court ought not to take upon itself to order the taxation of those charges, which the appellants have made in respect of business done by them merely in the capacity of parliamentary agents. It appears to me that on the principle to which I have referred all the authorities fall into line. None of them in my opinion is contrary to that principle. It has, I believe, been supposed that, when a solicitor acts as a parliamentary agent, his charges are subject to taxation under the Solicitors Act, 1843. In a loose sense that may be true, because it may not often be the case that a solicitor is found acting merely as a parliamentary agent, and making charges in that capacity only, but in the majority of such cases he would be acting also as solicitor for the parties who employ him, or the relation of solicitor and client would exist between them in respect of matters other than the parliamentary proceedings. Some of the authorities relied on for the respondent, when looked at closely, clearly do not support his contention.

In the case of *In re Sudlow* (1), for instance, it is stated that the solicitors were retained by a Mr. Hook to act as parliamentary agents on behalf of a railway company, and that the whole of the charges in their bill were for parliamentary business; but, if the grounds on which their counsel applied to discharge the order for taxation be looked at, it will be seen that they did not take the point that the solicitors had not delivered the bill as solicitors, but merely as parliamentary agents. They did not apply to discharge the order on the ground that the case was not within the purview of the Solicitors Act, 1843, but on the ground that the solicitors had been retained by Mr. Hook personally, and not by the directors of the company, who had obtained the order for taxation. They professed their willingness to submit to taxation of their bill, provided it was taxed on the parliamentary scale. That case is clearly no authority for the proposition that the charges of a parliamentary agent, who is also a solicitor, are always subject to taxation under the Solicitors Act, 1843. Then with regard to *In re Strother* (2) there were, I think, facts in that case which shew that the decision was never intended to be applicable to such a case as the present. There a solicitor had acted in respect of certain parliamentary proceedings, and it seems clear that, so far as he was concerned, he had acted in the capacity of solicitor for those who employed him, and in that capacity only; for he employed a parliamentary agent to obtain the bill in Parliament; and it would appear from what is stated at the bottom of page 519 of the report that the bill certainly included an item in respect of a charge for work done by him as a solicitor, and not as parliamentary agent; for it there appears that he had charged 30*l.* for drawing a certificate of new shares, a matter which would not fall within the ordinary province of a parliamentary agent. The principle laid down by Lord Langdale appears to me to explain all the cases on the subject. It may be that, if a solicitor, who has acted as a parliamentary agent in parliamentary proceedings, has also been acting in other matters as a solicitor for his employer, and he has delivered one bill including all his charges,

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(1) 11 Beav. 400.

(2) 3 K. & J. 518.

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the inference may be drawn that he acted quâ solicitor in respect of all the matters included in the bill, with the result that the parliamentary charges as well as the rest would be subject to taxation as those of a solicitor. It is not, however, now necessary to decide whether that would be so, or not, as that is not the present case.

Appeal allowed.

Solicitors for appellants: *Baker, Lees & Co.*
Solicitors for respondent: *Blair & W. B. Girling.*

E. L.

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Dec. 12.

[IN THE COURT OF APPEAL.]

SMITHERS *v.* WALLIS.

Employer and Workman — Compensation — Employment in Agriculture — Accident elsewhere than on Land of Employer — Workmen's Compensation Act, 1900 (63 & 64 *Vict. c.* 22).

To entitle an applicant to an award of compensation under the Workmen's Compensation Act, 1900, it is not necessary that the employment of the workman, at the time of the accident in respect of which compensation is sought, should have been "on or in or about" the land of the employer.

APPEAL from an award of a county court judge under the Workmen's Compensation Act, 1900.

The applicant was the widow of a man of the name of Smithers who, while in the employment of the respondent, met with an accident, from the effect of which he died. The respondent lived at Aldershot in a house with a garden attached to it, of about three quarters of an acre, and containing a greenhouse. There were also on the premises a coach-house and stables in which the respondent kept a carriage and horse. The respondent advertised for a handy man as gardener, whose duty would be to work in the house, look after the carriage and horse, drive, and attend to the garden and greenhouse. The deceased man applied for the position and was engaged. A few weeks after his engagement he was exercising the horse by driving it in the carriage, and

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while so doing, and at a distance of over three miles from his master's house, the carriage came into collision with another vehicle, and the deceased was thrown off and killed.

The county court judge found as a fact that the deceased was employed mainly in agricultural work, but partly in other work, within the meaning of s. 1, sub-s. 3, of the Workmen's Compensation Act, 1900, and that the respondent was liable, although the accident did not happen "on or in or about" the premises of the employer. (1) He accordingly made an award in favour of the applicant.

The employer appealed.

Ruegg, K.C., and *G. T. Sills*, for the employer. There are two grounds which shew that the award cannot be supported. The deceased was employed to look after the horse and carriage, and to do work in the house, and there was no evidence on which the county court judge could find that the deceased was employed mainly in agriculture. The other ground is that the Acts of 1897 and 1900 are to be read as one Act, and therefore the limitation in s. 7 of the former Act must be read into the Act of 1900. The latter Act, therefore, only applies to employment by an employer "on or in or about" his premises. The effect of the Act of 1900 is to include a new industry in the Act of 1897 under the same conditions as the industries to which it primarily applies. The Act of 1900 must be limited to accident occurring on the master's land, and this is further indicated by the expression "use of land" used in the definition of agriculture in s. 3. If this were not so, the liabilities of employers under this Act would extend to a distance from their premises, and would be very much more onerous than the liabilities imposed by the Act of 1897.

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(1) The Workmen's Compensation Act, 1900, enacts (s. 1, sub-s. 1): "From and after the commencement of this Act, the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment."

Sect. 1, sub-s. 3: "Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work.

"The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live-stock, poultry, or bees, and the growth of fruit and vegetables."

Sect. 2: "This Act . . . . shall be read as one with the Workmen's Compensation Act, 1897."

Herbert Reed, K.C., and *D. Stephens*, for the applicant, were not called on to argue.

COLLINS M.R. The facts before us shew that the deceased man was employed as a gardener, and that he also did miscellaneous work for his master, and among other things exercised his master's horse. While engaged on this latter employment he met with an accident, being at the time some distance from his master's premises, and the accident resulted in his death. The question is whether the Workmen's Compensation Act, 1900, applies to this case. The words of s. 1, sub-s. 1, are that the Act "shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment." It has not been disputed that the definition contained in those words covers this case. By sub-s. 3, "Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work," and by the same sub-section the word "agriculture" includes horticulture. By s. 2 the Act is to be read as one with the Workmen's Compensation Act, 1897. The only point of law raised on behalf of the master is that inasmuch as the deceased was not, at the time of the accident, on any premises belonging to his master, the applicant is not entitled to compensation, because, reading this Act as one with the Act of 1897, the limitation in s. 7 of the last-mentioned Act, of the area of the employment to which the Act applies, must be read into the later Act of 1900. That contention, it seems to me, cannot be supported in view of the words of the Act shewing that employment elsewhere than on the land of the master was contemplated, and the fact that there is nothing to limit the employment to physical presence on that land. Having regard to the necessity of a workman engaged in agricultural employment performing part of his work elsewhere than on his employer's premises, as, for example, when he drives cattle to market, it would be an anomaly to limit the Act as is suggested. There is no justification, in my opinion, for saying that the Act applies to a field in which a man is working, but that directly he leaves it a line is to be drawn excluding him from the operation of the Act. Such a conclusion is outside anything we can properly imply from the words of the Act. Such a case as the one before us is within the mischief intended to be remedied; there is nothing in the Act itself which imposes the suggested limitation, nor is there an application in terms of the limitation as to area contained in the prior Act. As to the question whether there was evidence that the deceased was employed mainly in agriculture, it is sufficient to say that there was evidence, and, that being so, the question was one of fact for the decision of the county court judge.

I think, therefore, that this award must stand and the appeal be dismissed.

ROMER L.J. I agree.

MATHEW L.J. The proposal on behalf of the employer is that we should alter the language of the Act of 1900 by reading words into it, and should construe it as if it provided that the Act should apply to the employment of workmen in agriculture, on or in or about the premises of the employer. I cannot see what reason can be suggested for depriving workmen of the protection afforded by the Act when employed in the ordinary course of their work, though they are not at the time when an accident occurs actually on their employers' premises.

Appeal dismissed.

Solicitors for applicant: *Cattarns & Co.*

Solicitors for employer: *Blyth, Dutton, Hartley & Blyth, for Foster & Wells, Aldershot.*

A. M.

C. A.
1902
Dec. 17.

[IN THE COURT OF APPEAL.]

SMITH *v.* SOUTH NORMANTON COLLIERY COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—"Accident arising out of and in the course of the Employment"—Workman leaving Mine after ceasing Work—Disobedience of Orders—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1.

The appellant, a workman, while working in the respondents' colliery, was, for disobedience of orders, suspended from work, pending an inquiry into the matter by the under-manager of the colliery. It appeared that men were not allowed to remain in the workings of the colliery when not at work; and the practice was for a workman who was suspended while at work to go to the pit bottom, i.e., the bottom of the shaft in which the cage worked, by which access to or egress from the mine was obtained. The appellant, when he was suspended, went into a place, called a "pass-by," at the side of the tramway leading to the pit bottom. While sitting there he was ordered by the deputy to go to the pit bottom. He remained however in the pass-by, where, about two hours later, a fall from the roof took place, by which he was injured. If the appellant had gone to the pit bottom as directed, he could not have got out of the mine till the cage went up in the ordinary course, which was later than the time at which the accident happened. Upon a claim by the appellant for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the accident did not arise out of and in the course of the appellant's employment:—

Held, that there was evidence upon which he was entitled so to find.

APPEAL from the refusal of the judge of the Derbyshire County Court to award compensation under the Workmen's Compensation Act, 1897, to the appellant in respect of injuries occasioned to him by an accident.

The appellant was a boy employed in the respondents' colliery. He was working on the day when the accident happened with two other boys under the directions of an older boy named Taylor whose orders it was his duty to obey. About 1.15 P.M. he refused to obey an order given by Taylor, upon which the latter told him to put on his clothes, which meant that he was to stop working for the day. Taylor gave evidence to the effect that he also told the appellant that he might as well go to the pit bottom, meaning the bottom of the shaft in which the cage worked by which access to or egress from the mine was obtained. The appellant denied that he was told by any one to go to the pit bottom. It appeared that, when a workman in the mine was sent away from work by a superior, the effect was that he was suspended until the matter was inquired into by the under-manager of the colliery. Workmen were not allowed to remain in the colliery workings when not at work; and the practice was for men who were suspended to proceed to the pit bottom, and there wait till the cage went up in the ordinary course, which on the day in question was not till 4 P.M. The appellant, when suspended, did not go to the pit bottom, but turned into a place of refuge by the side of the tramway leading to the pit bottom, called a "pass-by," in which the workmen were accustomed to leave their coats and eat their lunches. A man named Lane, who was a deputy at the colliery, gave evidence to the effect that he saw the appellant sitting in the "pass-by" at 1.30 P.M., and told him to go to the pit bottom. He remained, however, in the "pass-by" till about 3.40, when a fall of "bind" from the roof of the pass-by took place, which occasioned him the injuries in respect of which compensation was claimed.

The county court judge found that it was not proved that Taylor had ordered the appellant to go to the pit bottom, but that the deputy, Lane, had done so; but that the order had not been given in such a distinct and peremptory manner as to make disobedience to it wilful and serious misconduct, considering the nature of the order; but he found that the appellant had no business and ought not, after having been stopped from work, to have stayed in the "pass-by," and, as the accident happened to him over two hours after he had stopped work for the day, and in a place where he had at the time of the accident no right to be, the accident did not arise out of and in the course of his employment.

Hextall, for the appellant. Upon the evidence it is clear that the accident arose out of and in the course of the appellant's employment. If an accident happens upon the employer's premises to a workman, while going to or leaving his work, the accident may be said to arise out of and in the course of the employment. The appellant in this case, if he had gone at once to the pit bottom, could not have got out of the mine till 4 o'clock. If such an accident had happened to him, after he was suspended, while on his way to the pit bottom, or while waiting there till the cage went up, it is submitted that he would clearly have been entitled to compensation. The fact that he deviated from his orders slightly by staying in the "pass-by" on his way to the pit bottom for a portion of the time which he necessarily would have to spend in the mine, instead of going directly to the pit bottom, a deviation which the county court judge finds not to amount to serious misconduct, does not prevent the accident from having arisen out of and in the course of the employment. [He cited *McNicholas* v. *Dawson & Son* (1); *Whitehead* v. *Reader*. (2)]

Ruegg, K.C., and *William Appleton*, for the respondents, were not called upon to argue.

COLLINS M.R. In my opinion this appeal fails. In order to be entitled to claim compensation under the Workmen's Compensation Act, 1897, the appellant has to shew that the accident arose out of and in the course of his employment. The facts are as follows. At 1.15 P.M. on the day in question, there was some dispute between the appellant and a fellow-workman, who was his superior, which resulted in the latter dismissing him from work for the day. There was a conflict of evidence as to whether he was then told to go to the pit bottom, where he would have to wait till the cage went up at 4 o'clock. He went part of the way to the pit bottom, and got into one of the refuges by the side of the tramway. While sitting there he was seen by the deputy, who, as the judge finds, did order him to go to the pit bottom. He, nevertheless, remained in the pass-by about two hours, when a portion of the roof fell upon him, causing the injuries for which he claims compensation. The county court judge finds that he was not guilty of serious and wilful misconduct in disobeying the

(1) [1899] 1 Q. B. 773.

(2) [1901] 2 K. B. 48.

deputy's order to go to the pit bottom, but that he had no business, and ought not, after having been stopped from work, to have stayed in the "pass-by," and that, as the accident happened to him over two hours after he had stopped work for the day, and in a place where he had at the time of the accident no right to be, the accident did not arise out of or in the course of his employment. The county court judge has stated the grounds of fact upon which he arrived at his conclusion. It seems to me that there was evidence upon which he was entitled to find as he did, and I cannot see that he misdirected himself in any way. It is a question of fact, in such a case, up to what point of time, as between the employer and the workman, the employment can be said to continue after the workman has ceased to work. While the workman is physically engaged in making his exit from the place where he is employed, I think the employment would still continue for the purposes of the Act, and the workman would still be entitled to the protection thereby given. But, although the employment may continue during the interval which is necessarily occupied by the workman, after his suspension from work, in getting off the employer's premises, there must come a time, after the suspension of a workman, when he can no longer be said to be engaged in the employment, so that, if an accident happens to him, it can be said to arise out of and in the course of the employment. It appears to me to be a question of fact where the line is to be drawn, but there must be a line beyond which the liability of the employer cannot continue. The county court judge finds that the appellant received an order which debarred him from remaining any longer in the place where he was. He was in the workings, and there was evidence that men, who were not at work, were not allowed to remain loitering in the workings. He was, therefore, where primâ facie he had no business to be, and, while loitering there, he was ordered to go to the pit bottom. He continued however loitering in the pass-by till the accident happened. The county court judge upon these facts finds that the accident did not arise out of and in the course of his employment. I do not think we can say that upon the evidence he was wrong in point of

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law in so finding. For these reasons the appeal must be dismissed.

ROMER L.J. concurred.

MATHEW L.J. I am of the same opinion. I wish to guard myself against being supposed to hold that every deviation from the orders of a manager or a superior would in such a case divest the workman of the protection given by the Act. This is a peculiar case, and no such general conclusion is involved in our decision of it. There was evidence here that an order had been given to the appellant, after his suspension from work, to go to the pit bottom, which order was not obeyed; and the county court judge finds that the effect of his disobeying that order was to suspend the employment for the time being, so that the accident could not be said to arise out of and in the course of the employment. I cannot say as a matter of law that there was not evidence in this case to justify that conclusion.

Appeal dismissed.

Solicitors for appellant: *Frank Osbaldeston & Co., for Green & Williams, Nottingham.*

Solicitors for respondents: *Ullithorne, Currey & Jennings, for C. F. Elliott Smith, Mansfield.*

E. L.

THOMAS, APPELLANT; PRITCHARD, RESPONDENT.

1902
Oct. 30.

Crown—Prosecution—Summary Proceedings—Information under Acts relating to Revenue—Costs—Summary Jurisdiction Acts, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 18, *and* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 53.

By virtue of the Summary Jurisdiction Acts, 1848 (s. 18) and 1879 (s. 53), a Court of summary jurisdiction has power to give costs for or against the Crown in proceedings taken by the Crown under any of the statutes relating to His Majesty's revenue under the control of the Commissioners of Inland Revenue.

CASE stated, under the Summary Jurisdiction Acts, by a stipendiary magistrate of the county borough of Cardiff.

An information was preferred by the appellant, an officer of Inland Revenue, against the respondent for having had on his premises at the Grange Hotel, in the borough of Cardiff, a cask which was being subjected to a process for the purpose of extracting spirits absorbed in the wood thereof, in contravention of the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 4, sub-s. 1 (*b*).

The prosecution was by order of the Commissioners of Inland Revenue, and the information was preferred and the prosecution conducted on behalf of the Crown.

The magistrate found that the respondent was guilty of the offence charged in the information, and thereupon convicted him and fined him 5*l*.

An application having been made by the appellant's solicitor that the magistrate should order the respondent to pay the costs of the prosecution in addition to the fine, the magistrate refused that application on the ground that he had no power to make the order.

The question for the opinion of the Court was whether a Court of summary jurisdiction, upon convicting a person of an offence against s. 4 of the Finance Act, 1898, on the prosecution of the Crown, has power to order him to pay costs to the Crown in addition to the fine imposed.

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Sir Edward Carson, S.-G. (*S. A. T. Rowlatt* with him), for the Crown. The magistrate had power to order the respondent to pay costs to the Crown by virtue of s. 18 of the Summary Jurisdiction Act, 1848, and s. 53 of the Summary Jurisdiction Act, 1879. (1) Sect. 18 of the Act of 1848 gives power to justices, in their discretion, to award costs, but contains no mention of the Crown. By s. 35 nothing in the Act is to extend to proceedings under the Revenue Acts, certain penalties under those Acts being then recoverable under the special procedure provided by an Act of George IV. Sect. 53 of the Summary Jurisdiction Act, 1879, expressly applies the Summary Jurisdiction Acts, which are to be read together, to proceedings under the Revenue Acts before a Court of summary jurisdiction. The proviso to that section is important, because it refers to "the sum adjudged by conviction under or by virtue of any of the said statutes to be paid"; and by s. 49 the expression "sum adjudged to be paid by a conviction" includes any costs adjudged to be paid by the conviction of which the amount is ascertained by such conviction. The Legislature, therefore, contemplated that the sum adjudged by conviction to be paid in proceedings taken under the Revenue Acts might include costs. By s. 55 and Sched. II. the words of exception in s. 35 of the Act of 1848 are repealed. By s. 31 the Court of quarter sessions on an appeal against a conviction or order of a Court of summary jurisdiction may make such order as to costs to be paid by the party as the Court may think just. The principle of the decision in *Moore* v. *Smith* (1) governs this case. Although the Crown is not expressly named in the Summary Jurisdiction Act, 1848, it is by a necessary implication from the legislation bound by the provisions of that Act. *Reg.* v. *Beadle* (2) may be relied on for the respondent. That was a decision upon 12 & 13 Vict. c. 45, which enabled quarter sessions to give costs on appeal. The appeal in that case was from an order of acquittal of the defendant in a prosecution under the Excise Acts. The Act was a general Act relating to procedure, and contained no mention of the Crown or of the Excise Acts. The quarter sessions dismissed the appeal with costs, and their order was quashed by the Court of Queen's Bench on the ground that the Crown was not bound by the provisions of the Act, either expressly or by necessary implication. That decision has, therefore, no application to the present case.

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(1) The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18: "In all cases of summary conviction or of orders made by a justice or justices of the peace it shall be lawful for the justice or justices making the same, in his or their discretion, to award and order in and by such conviction or order that the defendant shall pay to the prosecutor or complainant respectively such costs as to such justice or justices shall seem just and reasonable in that behalf; and in cases where such justice or justices, instead of convicting or making an order as aforesaid, shall dismiss the information or complaint, it shall be lawful for him or them, in his or their discretion, in and by his or their order of dismissal to award and order that the prosecutor or complainant respectively shall pay to the defendant such costs as to such justice or justices shall seem just and reasonable, and the sums so allowed for costs shall in all cases be specified in such conviction or order or order of dismissal aforesaid, and the same shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered then such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of such distress by imprisonment, with or without hard labour, for any time not exceeding one calendar month unless such costs shall be sooner paid."

Sect. 35: "Nothing in this Act shall extend or be construed to extend to . . . . any information or complaint or other proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes, or Post Office. . . ."

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 53 ". . . . The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints, and other proceedings before a Court of summary jurisdiction under or by virtue of any of the said statutes:

"Provided, that where the sum adjudged by conviction under or by virtue of any of the said statutes to be paid exceeds 50*l.*, the period of imprisonment imposed by a Court of summary jurisdiction in respect of the non-payment of such sum, or in respect of the default of a sufficient distress to satisfy such sum, may exceed three months but shall not exceed six months."

By s. 55 and Sched. II. the words in s. 35 of the Summary Jurisdiction Act, 1848, set out above, are repealed.

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(1) (1859) 1 E. & E. 597.

(2) (1857) 7 E. & B. 492.

1902

THOMAS
v.
PRITCHARD.

[LORD ALVERSTONE C.J. In the judgment prepared by Wright J. in *Rex* v. *Archbishop of Canterbury* (1) there is this passage: "As incidental to departmental administration there must often be litigation which does not directly affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party. And the case of *Moore* v. *Smith* (2) supports this view."]

Holman Gregory, for the respondent. The decision in *Reg.* v. *Beadle* (3) applies here. The Summary Jurisdiction Acts are general Acts relating to procedure as between subject and subject, as was the 12 & 13 Vict. c. 45, upon which that case was decided. Unless there is some special provision as to costs with respect to the Crown, the old common law rule applies that costs cannot be given for or against the Crown. The Summary Jurisdiction Act, 1879, contains no such special provision; nor does the Act of 1848. Sect. 53 of the Act of 1879 does not give any new right, or impose any new liability, upon the Crown; it merely applies certain procedure by which rights may be enforced. *Moore* v. *Smith* (2) is distinguishable. The question arose, under a different statute, with respect to the costs of an appeal to quarter sessions, not with respect to the power to give costs upon a conviction by justices. The Crown is not bound by s. 18 of the Act of 1848, because it is not named in that Act, and there is no express provision affecting the Crown as to the costs of summary proceedings before justices in the Act of 1879.

Sir Edward Carson, S.-G., replied.

LORD ALVERSTONE C.J. The discussion on this matter which has taken place in recent years shews that the question raised is not free from difficulty. The principle which we have to consider is tolerably clear; the difficulty arises in its application. The Crown is not bound by an Act of Parliament unless specially named, or unless there is a necessary implication to be drawn from the provisions of the Act, or from the legislation on the subject, that the Crown was intended to be bound. Two cases which were cited in argument shew clearly, I think, that that is the principle. In the first, *Reg.* v. *Beadle* (1), the Court had to consider the provisions of 12 & 13 Vict. c. 45 with respect to payment of costs, and they came to the conclusion that, the Act being a perfectly general Act relating to procedure, and applicable under ordinary circumstances to cases between subject and subject, there was no sufficient implication that the Crown was intended to be bound by those provisions. They therefore held that an order that the Crown should pay costs in that case could not be supported. The second case, *Moore* v. *Smith* (2), was a decision upon 20 & 21 Vict. c. 43, which may equally, I think, be said primâ facie to be a general Act relating to procedure. The Court of Queen's Bench came to the conclusion that, as s. 4 of the Act contained a reference to the right of the Attorney-General to order a case to be stated, not merely in the interests of the Crown but in the interests of the discharge of his important duties as Attorney-General, there was sufficient to shew that the Crown was intended to be subject to the provisions of s. 6, which gave power to award costs to the successful party on an information. In his judgment Lord Campbell, who had been a party to the decision in *Reg.* v. *Beadle* (1) and was a great authority on any matter relating to Crown rights, said (3): "It is a maxim that the Crown is not bound by Act of Parliament without express words. But I think that there is express language in this statute to shew that it includes all cases of appeal, and therefore those in which the Crown is interested." That was obviously only an implication. It was not that the Crown was named, but that all cases of appeals, including those of the Crown, were included. Crompton J., also a high authority on such a matter, said (4): "I am inclined to think that even without s. 4 the Crown would be within the provisions of s. 6, which appear to me to apply to all cases of appeal under the statute. The ratio decidendi in *Reg.* v. *Beadle* (1) does not apply here.

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(1) [1902] 2 K. B. 503, at p. 572.

(2) 1 E. & E. 597.

(3) 7 E. & B. 492.

(1) 7 E. & B. 492.

(2) 1 E. & E. 597.

(3) 1 E. & E. at p. 600.

(4) 1 E. & E. at p. 601.

Here is an Act giving, by s. 2, a general right of appeal from the determination by justices of 'any information or complaint.' Sect. 4, giving the Attorney-General the right to require a case to be stated, clearly contemplates Crown proceedings as within the Act. Then s. 6, respecting costs, is clearly applicable to all cases within s. 4, and therefore includes Crown cases." That was the way in which the Court of Queen's Bench dealt with the application of the principle that the Crown is not bound unless expressly named. In the present case the first material statute is the Summary Jurisdiction Act, 1848. It is clear that whoever drew that statute thought Crown rights might be affected by the general procedure of the Act, and by the insertion in it of provisions of which the Crown might at times undoubtedly take the benefit when it prosecuted for penalties, and s. 35 accordingly contains an express provision that "Nothing in this Act shall extend to any information or complaint or other proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes, or Post Office." That provision carries the matter no farther than this: it was there apparently recognised that the question would have to be considered whether the general provisions of the Act rendered the Crown, or the proceedings of the Crown, subject to the Act. The express exemption, of course, prevented such an argument from being raised. Then comes the Summary Jurisdiction Act, 1879, upon which the question in this case really turns, and it is important, I think, to remember that it was passed after the passing of other Acts under which rights had been enforced by and against the Crown in Courts of summary jurisdiction. Sect. 31 contains provisions with respect to the payment of costs in appeals. Then s. 53, after providing that the Summary Jurisdiction Acts shall apply to all proceedings before a Court of summary jurisdiction under the statutes relating to the Post Office, and that offences under those statutes for which a person is liable to forfeit a sum not exceeding 20*l.* may be prosecuted in manner provided by the Summary Jurisdiction Acts, goes on to say: "The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's Revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints and other proceedings before a Court of Summary Jurisdiction under or by virtue of any of the said statutes." Following on that there is (s. 55 and Sched. II.) a repeal of the express exemption, which I have read, contained in s. 35 of the Summary Jurisdiction Act, 1848. We have to say whether that legislation, in terms referring to the Crown, is sufficient to raise the implication or presumption that the Crown was intended to be bound by the provisions of s. 18 of the Summary Jurisdiction Act, 1848, as to costs. I think it is sufficient. In my opinion the argument for the respondent must, having regard to *Moore* v. *Smith* (1), recognise that some of the provisions of the Act do apply to the Crown; but the argument must be that, although the Summary Jurisdiction Acts are to apply to all informations, complaints, and other proceedings before a Court of summary jurisdiction under or by virtue of the statutes relating to the revenue, the provision as to costs is not to apply. As my brother Wills pointed out, all the Summary Jurisdiction Acts are to be read together, and it seems to me too strong a thing to say that the Crown, specifically named as it is for the purpose of taking these proceedings under the Summary Jurisdiction Acts, is not intended to be bound by the provision as to costs. I therefore come to the conclusion that this is one of the cases in which the Crown is liable to pay, and has the right to receive, costs. I think it is one of the cases referred to by my brother Wright in *Rex* v. *Archbishop of Canterbury* (2), in the passage in his judgment in which he cites *Moore* v. *Smith.* (1) I desire to add that there is, in my opinion, an absolute necessity for legislation on this matter, which is one that ought to be made perfectly clear. It is of great importance to the interests both of the Crown and the subject that the question should be settled, so that the parties may know exactly how they stand. For the reasons I have given I am of opinion that the magistrate ought to have made an order that the Crown should receive costs, and that the case should be sent back to him to make that order.

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(1) 1 E. & E. 597.

(2) [1902] 2 K. B. 503, at p. 572

WILLS J. I am of the same opinion on the same grounds.

CHANNELL J. So am I.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Riddell & Co.*

W. A.

C. A.
1902
Nov. 28;
Dec. 1.

[IN THE COURT OF APPEAL.]

Ex parte MENDELSSOHN.
In re MENDELSSOHN.

Bankruptcy—Receiving Order—Stockbroker—Default on Stock Exchange—Administration of Assets by Stock Exchange Assignee—Right of Stock Exchange Creditor to petition in Bankruptcy.

A member of the London Stock Exchange having become a defaulter, a Stock Exchange creditor, who has come in and has received dividends under the administration of the defaulter's assets by the official assignee of the Stock Exchange, and has also recovered judgment in an action for his debt, can maintain a petition in bankruptcy against the defaulter, founded on the balance of the judgment debt after deducting the dividends which he has received and for which he must give credit.

The Stock Exchange cessio bonorum does not operate as an accord and satisfaction or a release of the defaulter's debts.

APPEAL from a receiving order made by one of the registrars in bankruptcy against the debtor Mendelssohn.

The debtor was a stockbroker and a member of the London Stock Exchange. Messrs. Ratcliff & Dealtry, the petitioning creditors, were stock-jobbers, and were also members of the London Stock Exchange. On May 16, 1901, the debtor was declared a defaulter on the Stock Exchange. At the account day on May 13 differences amounting to 986*l.* were due from the debtor to the petitioning creditors in respect of purchases and sales of stocks and shares. Other transactions in shares were carried over as between the petitioning creditors and the debtor to the next account day at the end of May. On the debtor being declared a defaulter, the official assignee of the Stock Exchange took possession of his assets, and closed his open transactions at the "hammer" price of the day. The difference between the contract price and the "hammer" price on the transactions with the petitioning creditors amounted to 281*l.* The petitioning creditors claimed in the Stock Exchange liquidation and received dividends. The transactions in the shares which were carried over on May 13 were carried out and settled at the next account on behalf of the debtor's principals through other brokers. In accordance with the rules and practice of the Stock Exchange the petitioning creditors were required to pay over to the official assignee as part of the debtor's estate the sum of 281*l.*, which they had received through the other brokers, that sum being the difference between the contract price and the "hammer" price of the shares carried over.

The petitioning creditors brought an action against the debtor in the King's Bench Division for the 986*l.* and the 281*l.* At the trial by Mathew J. judgment was given for the plaintiffs for the amount claimed, less dividend which they had received: *Ratcliff* v. *Mendelssohn* (1); and this decision was affirmed by the Court of Appeal. (2)

In October, 1902, the petitioning creditors served a bankruptcy notice upon the debtor, and he committed an act of bankruptcy by failing to comply with the requirements of the notice.

The bankruptcy petition was founded on this act of bankruptcy, and the balance of the judgment debt, which, after allowing for the dividends which the petitioning creditors had received in the Stock Exchange liquidation, amounted to 744*l.*

The registrar made a receiving order.

The debtor appealed.

Muir Mackenzie and *J. R. Atkin*, for the debtor. It is submitted that the petitioning creditors, having claimed in the

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(1) [1901] 2 K. B. 844.

(2) [1902] 2 K. B. 653.

Stock Exchange administration of the debtor's assets and received dividends, cannot now maintain a bankruptcy petition against him in respect of the same matter. It would be inequitable for them to do so. The Stock Exchange administration operated as a general cessio bonorum of all the debtor's assets; it was equivalent to a general assignment of all his property for the benefit of his Stock Exchange creditors: *Richardson* v. *Stormont* (1); *Tomkins* v. *Saffery.* (2) When there has been a cessio bonorum, and the dividend has been received, satisfaction of the debt is to be inferred: *Whitmore* v. *Turquand.* (3) The decision in *Ratcliff* v. *Mendelssohn* (4) was only that the plaintiffs (now the petitioning creditors) were entitled to judgment; it does not follow that they are entitled to proceed in bankruptcy against the judgment debtor. *Ex parte Ward* (5), one of the cases on which the Court of Appeal relied in *Ratcliff* v. *Mendelssohn* (4), was only a decision that a creditor of a defaulter on the Stock Exchange, who has taken the benefit of the distribution of assets by the official assignee of the Stock Exchange, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the Stock Exchange assignee. That decision related to the bringing of an action, not to a bankruptcy petition. And, moreover, the Court apparently thought that the whole of the defaulter's assets did not vest in the Stock Exchange assignee. Cotton L.J. (6) spoke of the "ordinary assets" of the debtor as distinct from his Stock Exchange assets. In the more recent case, *Richardson* v. *Stormont* (1), it was distinctly held that the rules of the Stock Exchange operate as an assignment of all the assets of the defaulter to the official assignee. *Ex parte Ward* (7), the other case on which the Court of Appeal relied in *Ratcliff* v. *Mendelssohn* (4), only decided that the amount of the differences due by a defaulter on the Stock Exchange, as fixed by the official assignee under the rules, was a "liquidated

(1) [1900] 1 Q. B. 701.

(2) (1877) 3 App. Cas. 213.

(3) (1861) 3 D. F. & J. 107, 110.

(4) [1901] 2 K. B. 844; [1902] 2 K. B. 653.

(5) (1882) 20 Ch. D. 356.

(6) 20 Ch. D. at p. 363.

(7) (1882) 22 Ch. D. 132.

sum" which would support a bankruptcy petition against the defaulter. But there again the Court of Appeal spoke of the fund administered by the official assignee as "a particular fund." In the present case the petitioning creditors have received dividends out of a fund which consisted of the whole of the debtor's assets. In *Ex parte Tynte* (1) it was held by Bacon C.J. that a judgment creditor, who had omitted to come in under a decree in Chancery for the administration of the debtor's only asset, a life estate in land, for the benefit of his creditors, was not entitled to petition in bankruptcy against the debtor. In *Ipstones Park, &c., Co.* v. *Pattinson* (2) it was held that a deed under s. 192 of the Bankruptcy Act, 1861, was not a bar to an action by a creditor; but the Court intimated that an application might be made to the Court of Bankruptcy to stay proceedings. It is submitted that here the Stock Exchange distribution amounted to a satisfaction of the Stock Exchange creditors. Though the Stock Exchange rules do not involve a release of the defaulter, yet the principle of *Ex parte Stray* (3) applies. There it was held that a creditor, who had acquiesced in the execution by the debtor of a deed of assignment for the benefit of his creditors, could not avail himself of the deed as an act of bankruptcy, even though he might not be bound by the provisions of the deed. In *Field* v. *Lord Donoughmore* (4) it was held that a creditor who has taken any step inconsistent with the provisions of a deed for the benefit of creditors, which he has not executed, will be deprived of all advantage arising therefrom. Moreover, under s. 7, sub-s. 3, of the Bankruptcy Act, 1883, the Court has a discretion as to making a receiving order; it may dismiss the petition, if satisfied that the debtor is able to pay his debts, "or that for other sufficient cause no order ought to be made."

Herbert Reed, K.C., and *Carrington*, for the petitioning creditors, were not called upon.

VAUGHAN WILLIAMS L.J. This appeal is against a receiving order. The ground of the appeal is that the debtor, being a

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(1) (1880) 15 Ch. D. 125.

(2) (1864) 2 H. & C. 828.

(3) (1867) L. R. 2 Ch. 374.

(4) (1841) 1 D. & W. 227.

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MENDELSSOHN, *Ex parte.* MENDELSSOHN, *In re.*

Vaughan Williams L.J.

member of and a defaulter on the Stock Exchange, and being, therefore, by virtue of his own contract subject to the rules of the Stock Exchange, there has been under those rules a vesting of all his assets in the official assignee of that body. It is not suggested that there is not a good debt to support the bankruptcy petition, so far as the mere result of that assignment to the Stock Exchange official assignee is concerned. That that debt is a liquidated sum which will support the petition is not contested. In truth the two decisions in *Ex parte Ward* (1) make it impossible to dispute either of those propositions. But it is suggested that, there having been under the Stock Exchange rules this cessio bonorum, there no longer remains due to the petitioning creditors a debt in respect of which they ought to be allowed to present a petition in bankruptcy and to obtain a receiving order against the debtor. It is in effect said that, there being one administration in force under which the whole of the debtor's assets are being distributed, no creditor ought to be allowed to obtain an order which will result in a second administration. And in particular it is said that these creditors ought not to be allowed to obtain such an order, because they have accepted their share under the distribution by the Stock Exchange official assignee. We have to consider whether there is any substance in these points.

Mr. Muir Mackenzie's first contention was put in two ways. First, he said that the judgment of Lord Campbell L.C. in *Whitmore* v. *Turquand* (2) shews that these petitioning creditors are not entitled to obtain a receiving order. But if *Whitmore* v. *Turquand* (2) is carefully examined it will be found that the whole basis of the decision is expressed in this passage in the marginal note: "Although the deed contained no release or stipulation that the dividend was to be taken in full satisfaction of the debts, *Held*, that satisfaction ought to be inferred as the deed constituted a cessio bonorum." That is not a decision that in the case of every deed which constitutes a cessio bonorum it ought to be inferred that it is in satisfaction of the debt of every creditor who is bound by the deed. It is only

(1) 20 Ch. D. 356; 22 Ch. D. 132.

(2) 3 D. F. & J. 107.

a decision that in that particular case such was the right inference to draw. Indeed, it is plain that in *Ex parte Ward* (1) the Court of Appeal arrived at a conclusion wholly inconsistent with the view that in every case in which there is a cessio bonorum it must be inferred that there is a satisfaction of the debts.

The second case upon which Mr. Muir Mackenzie relied was *Ex parte Tynte.* (2) In that particular case Bacon C.J. did arrive at the conclusion that there was in existence a decree of the Court of Chancery under which the petitioning creditor could have come in and taken the benefit of it, and that, pending that decree, he was not entitled to have an adjudication of bankruptcy made against the debtor. I will not say more of that case than that I am not able quite to follow the judgment of the chief judge, and that if one looks at the statement of the facts of the case it seems to me very difficult to draw the conclusion of law which the learned judge appears to have drawn. The head-note is this: "A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bankruptcy against the debtor, though within the twelve years a suggestion has been entered on the roll under the Common Law Procedure Act, 1852, s. 129." In giving his decision the learned judge said: "I think this is a very improper proceeding. I cannot doubt that the petitioning creditor was fully aware of the suit of *Ford* v. *Tynte*, and other suits instituted for the purpose of making available for judgment creditors and mortgagees the only property that Colonel Tynte had, that is to say, his life interest in the settled estate, and therefore it is also a decree for the benefit of the judgment creditors. The petitioning creditor, knowing quite well that there was a decree made in his favour, and that if the proceeds should be enough to satisfy all the charges that preceded his, he would get paid, has not thought fit to come in under that decree. Then after all these years he attempts to make this gentleman a bankrupt in order to have the proceedings transferred to the jurisdiction of

(1) 20 Ch. D. 356.

(2) 15 Ch. D. 125.

bankruptcy—the most preposterous notion that ever came into anyone's head. It is not suggested, and there is no evidence, that Colonel Tynte has any other assets." I do not quite understand the ground of the decision. But it is sufficient for me to say that, whatever may have been the rights of the petitioning creditor there, and however much his position may have been such that he could not resort to bankruptcy proceedings, that case was entirely different from the present case. In the present case there is a cessio bonorum, by virtue it may be of the rules of the Stock Exchange, which has resulted in a debt which, according to the two decisions in *Ex parte Ward* (1), is, first, a debt in respect of which the creditors have a good cause of action for the amount payable by the debtor on the closing of the account under the Stock Exchange rules, and, secondly, is a good debt to support a bankruptcy petition. It will be observed that if the point which Mr. Muir Mackenzie now makes was a good one there was nothing to prevent its being raised there, for in the report of *Ex parte Ward* (2) it is stated that "the official assignee of the Stock Exchange, in accordance with its rules, closed all Ward's Stock Exchange transactions and distributed such assets as he obtained in this way among Ward's Stock Exchange creditors." So that it appears that the petitioner there was in the same position as the petitioners here: he had taken the benefit of the distribution by the official assignee of the Stock Exchange.

The only other point taken was this—it was contended that these creditors were personally prevented from presenting the petition because they came within the doctrine of *Ex parte Stray.* (3) It was said that they were in the position of a creditor who has assented to a deed—either a composition deed or a deed providing for the distribution of the debtor's property—and who is thereby prevented from afterwards doing any act inconsistent with his own assent. But it is manifest that the state of facts which arises when a member of the Stock Exchange is declared a defaulter does not place his Stock Exchange creditors in the same position as creditors who have assented to a composition deed, or who have assented with the other creditors to a distribution of the debtor's assets under a deed.

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(1) 20 Ch. D. 356; 22 Ch. D. 132.

(2) 22 Ch. D. 132.

(3) L. R. 2 Ch. 374.

I desire to add that I have been speaking only of the effect of this proceeding on the Stock Exchange in so far as it affects the right of a creditor to present a bankruptcy petition and obtain a receiving order against the defaulter. I say nothing as to what may or may not be the effect of the relation back of the title of the trustee in the bankruptcy, in any case in which the petition is presented before the period of relation has expired, upon the distribution of the debtor's assets which has already taken place upon the Stock Exchange.

In my opinion this appeal ought to be dismissed and with costs.

STIRLING L.J. I am of the same opinion. It is established by the decision of this Court in *Ratcliff* v. *Mendelssohn* (1) that these petitioning creditors have a valid debt at law which is enforceable against the debtor by the ordinary legal remedies. But it was said, and it is true, that that decision does not conclude the question which now arises—namely, whether the petitioning creditors are entitled to a receiving order. Sect. 7, sub-s. 3, of the Bankruptcy Act, 1883, provides that if (inter alia) the Court "is satisfied by the debtor, that he is able to pay his debts or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." Now, what reason is alleged for saying that no order ought to be made here? It is said that the petitioning creditors have come in and taken the benefit of a cessio bonorum by the debtor, and that they ought not now to be allowed to take proceedings against him in bankruptcy. I cannot see that that is a valid reason. The debt, as I have already said, exists and is enforceable. As the result of the debtor's contract with the petitioning creditors, they being all members of the Stock Exchange, the petitioning creditors have had the benefit of the distribution of the debtor's assets which has taken place in accordance with the Stock Exchange rules. But the remedy in bankruptcy

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(1) [1902] 2 K. B. 653.

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Stirling L.J.

is wider, and may bring in assets—namely, after-acquired property of the debtor—which are not available under the Stock Exchange proceedings. Unless, therefore, there is some authority to the contrary, it seems to me that on principle the petitioning creditors are entitled to a receiving order.

Now of the authorities which have been relied on in support of the debtor's contention the first is *Whitmore* v. *Turquand* (1), a decision of Lord Campbell L.C. But the basis of that decision was that in the circumstances satisfaction of the debt ought to be inferred, and consequently that the debt was at an end. The contrary has been decided in the present case by the Court of Appeal, following the former decision of the same Court in *Ex parte Ward* (2), in which it was held that, notwithstanding the proceedings upon the Stock Exchange, the debt of the defaulter still existed. The other case which was relied on for the appellant was *Ex parte Tynte* (3), a decision of Bacon C.J. It is sufficient to say that that decision was finally rested by the learned judge upon the provisions of the Real Property Limitation Act of 1874, which in his view barred the creditor from taking any proceedings. No doubt in the course of his judgment the learned judge made observations which have some bearing on the present case, but I confess that I am unable to follow his reasoning.

In these circumstances it seems to me that the contention of the debtor is not supported by either principle or authority, and I agree that the appeal ought to be dismissed.

COZENS-HARDY L.J. I agree. I think the case is really governed by previous decisions of this Court. I was a party to the judgment of the other Division of this Court in *Ratcliff* v. *Mendelssohn* (4), which established that there was in the present case no accord and satisfaction by reason of the Stock Exchange cessio bonorum, but that there was notwithstanding that cessio a good judgment debt. Such a debt is primâ facie capable of supporting a bankruptcy petition, and it ought to be followed by a receiving order, unless there is some special

(1) 3 D. F. & J. 107.
(2) 20 Ch. D. 356.
(3) 15 Ch. D. 125.
(4) [1902] 2 K. B. 653.

ground which renders it inequitable that such an order should be made. Here the petition was presented more than three months after the default. Under the receiving order other assets will ultimately vest in the trustee and will be available for the creditors. What have the petitioning creditors done to deprive themselves of the right to the receiving order for which they ask? I confess I cannot see any ground for answering that question otherwise than in the negative.

The decision of this Court in *Ex parte Ward* (1) in my judgment absolutely covers the present case, subject only to this observation, that the point seems not to have been taken by counsel in argument, and therefore was not alluded to by the judges in their judgments. But, having regard to the observations made by the learned judges, it is, I think, impossible to suppose that the point was not present to their minds.

I will only add with reference to *Ex parte Tynte* (2) that I cannot follow the judgment of Bacon C.J., if it is to be regarded as laying down any general rule.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Osborn & Osborn; M. Abrahams, Sons & Co.*

(1) 22 Ch. D. 132.

(2) 15 Ch. D. 125.

W. L. C.

C. A.
1902
Dec. 18.

[IN THE COURT OF APPEAL.]

TRUSTEE OF G. MELLOR (A BANKRUPT) *v.* MAAS AND ANOTHER.

Bill of Sale—Hiring and Purchase Agreement—Intention of Parties to Agreement—Inference to be drawn from Facts—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act,* 1878, *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.

The owner of an hotel contracted with a purchaser for the sale of the hotel, and the chattels therein, for a lump sum. The purchaser, being short of a portion of the purchase-money, applied to the defendants for a loan on mortgage, which was refused; but it was arranged that the defendants should offer to purchase the chattels, and their offer was accepted and the money paid to the vendor. The defendants then entered into an agreement with the purchaser of the hotel for the hiring and purchase by instalments by him of the chattels, and this agreement contained a licence to seize the chattels on certain defaults being made. The purchase of the hotel was then completed, and the purchaser entered and carried on the business. Subsequently the defendants seized the chattels on a default being made. The purchaser became bankrupt, and his trustee claimed the chattels, and brought this action to recover them. The learned judge before whom the case came decided that the true inference from the facts was that the money paid by the defendants was a loan to the purchaser of the hotel to enable him to complete the purchase, and that the hire-purchase agreement was a security for that loan, and was void for want of registration under the Bills of Sale Acts, and gave judgment for the plaintiff. On appeal:—

Held, that there was evidence to support the conclusion that the defendants had advanced the money by way of a loan upon the security of the hire-purchase agreement, and that, as the only claim of the defendants to the chattels arose under that agreement, which was void for want of registration as a bill of sale, the plaintiff was entitled to recover.

Judgment of Wright J., [1902] 1 K. B. 137, affirmed.

APPEAL from a judgment of Wright J., reported [1902] 1 K. B. 137.

The action was brought by the trustee of a bankrupt claiming that he was entitled to certain chattels as part of the estate of the bankrupt, under the following circumstances.

By a written contract dated May 4, 1899, one Sykes agreed to sell to G. Mellor a freehold hotel at Leamington, with the furniture, fixtures, and effects in and about the same, for the sum of 30,000*l*. A deposit of 750*l*. was to be paid, and the purchase was to be completed on May 15, 1899. It was one of the terms of the contract that 27,000*l*., part of the purchase-money, should be secured by first, second, and third mortgages on the hotel. The deposit was paid. An inventory of the chattels was made, and their value was agreed at 3000*l*. Prior to May 15 Mellor, who was short of money, wanted 2000*l*. to enable him to complete the purchase. He went to one Maas, a member of the defendant firm, who were wine and spirit merchants, and told him of the purchase of the hotel and the value of the furniture, and asked for 2000*l*. on a fourth mortgage of the hotel. Maas declined a fourth mortgage, and Mellor refused to give a bill of sale. Maas then said that the only way was for some one to purchase the chattels of Sykes and sell them to Mellor on a hire-purchase agreement. The contract of May 4 was not shewn to Maas.

On the morning of May 15 Maas called on Sykes, told him that Mellor was short of money, and proposed to purchase the chattels at the hotel for 2000*l*. He also told Sykes that unless the chattels were sold to him in this way the purchase could not be completed. Sykes took Maas to his solicitor, and, after some discussion, Sykes agreed to sell the chattels to Maas for 2000*l*., which sum Maas then paid, and took the following receipt of Sykes:—

"Received this 15th day of May, 1899, of Messrs. Emil Pohl Maas & Co., the sum of two thousand pounds, being the purchase-money of the fixtures, fittings, furniture, plate, linen, and other effects comprised in the inventory dated 15th of May, 1899, made by Messrs. John Hart, Bridges & Co., and signed by me. (Signed) R. D. Sykes."

Later on the same day the purchase of the hotel was completed. On the same day, but before completion of the purchase, Mellor signed with the defendant firm a hire-purchase agreement for the chattels for 2412*l*. 16*s*., to be paid by instalments. This agreement contained the usual licence to seize on default in payment of any instalment. At the same time Mellor signed an agreement to purchase all his wine and spirits from the defendant firm. Mellor carried on the business of the hotel for some time, and some instalments under the hire-purchase agreement were paid; but in December, 1900, he was adjudicated a bankrupt. The plaintiff, who was the trustee in bankruptcy of Mellor, then brought this action against Maas and Co., claiming a declaration that the hire-purchase agreement was a bill of sale within the meaning of the Bills of Sale Acts, and void for want of registration, and that he was entitled to the chattels as part of the estate of the bankrupt. By arrangement the chattels had been sold and realized 1750*l.*, which sum had been paid into a bank in joint names.

The learned judge gave judgment in favour of the plaintiff. (1) The defendants appealed.

Herbert Reed, K.C., and *F. Mellor*, for the defendants. This case is distinguishable from *Beckett* v. *Tower Assets Co.* (2), for Mellor was not the owner of the goods, and could not acquire a right to them till he paid for them. He had no property in the goods, for he consented to their being sold to the defendants instead of to him upon condition that he should have a hire-purchase agreement, and his only right thereupon was to insist that the agreement should be carried out. The evidence was all one way, and shewed that there was a sale to Maas, who did not know that the agreement of May 4 was for a lump sum which included the price of the furniture. Had he known of this, it would have been open to him to insist that the purchase price should be split up and part allotted to the furniture.

Muir Mackenzie (with him *H. J. Rowlands*), for the plaintiff. The plaintiff is entitled to judgment, for the facts of the case shew that there was one continuous transaction which was in substance a loan upon security. The actual facts must be looked at, and not the mere paper transaction. It is fallacious to say that Mellor had no title. He was buying the whole concern, and as between him and Sykes there

(1) [1902] 1 K. B. 137.

(2) [1891] 1 Q. B. 638.

was no allocation to the goods of any separate part of the purchase-money.

[He was stopped].

H. Reed, K.C., in reply.

COLLINS M.R. I am of opinion that this appeal fails. The learned judge who decided the case had distinctly in his mind, as appears by his judgment, the principles on which the matter for his determination rested, and he pointed out that the case raised a somewhat nice question, more of fact than of law. The question, therefore, for this Court is whether the learned judge had before him materials which warranted the conclusion of fact to which he came, for I need hardly say that where a judge has heard the witnesses give their evidence, and is fully alive to the bearing of the law upon the facts, this Court would be loath to interfere with his decision on the facts.

The question that had to be determined was whether the transaction to which the defendants were parties was or was not a loan on the security of the hire-purchase agreement, though the transaction was carried out in a way that at first sight might appear not to bring it within the Bills of Sale Acts. If in point of fact the real transaction was a loan upon security, and the defendants have to rely upon the agreement, they must fail, because the agreement would be a bill of sale, and, not being registered, would be void.

It appears that the vendor was prepared to allow part of the purchase-money to remain on mortgage, but that the purchaser found a difficulty in raising the balance of 3000*l.*; as to 1000*l.* of this he made an arrangement, and then went to the defendants, who were interested in the transaction being carried through, because they were going to supply wine and spirits to the hotel. They declined to lend this sum on mortgage, and the suggestion as to a bill of sale appears to have come from them, but not to have been accepted by the purchaser. Those two means of raising the money having failed, the suggestion as to the purchase of the chattels by the defendants and their hire to the purchaser was adopted and carried out. Under the hire-purchase agreement the defendants acquired the same right to recover possession of the furniture as if the original suggestion of a bill of sale had been carried out. We do not know what relation the value of the furniture bore to the money agreed upon as the purchase price, for there does not appear to have been a valuation made for this purpose. It is suggested that the actual transaction that took place was in fact a loan on the security of the hire-purchase agreement, and that was the conclusion at which the learned judge arrived on consideration of the facts. If his view was right, the agreement was a bill of sale and void for want of registration, and if impeached the whole transaction fell through. I see no reason to differ from the learned judge as to the real meaning of the transaction. I ought to notice a suggestion that the bankrupt had no title to the furniture; but it has been pointed out that as between him and the vendor of the hotel there was no allocation of any part of the purchase-money to the furniture. The bankrupt was as between them inchoate owner of the furniture, and was in possession of it at the date of the bankruptcy, and the result is that the trustee was entitled to bring this action. The appeal must be dismissed.

Romer L.J. I am not prepared under the circumstances of this case to differ from the conclusion at which the learned judge arrived. He found that the hire-purchase agreement was only a method of obtaining security for a loan. Under these circumstances I cannot distinguish this case from *Beckett* v. *Tower Assets Co.* (1), a case in which the principles that govern the decision in the case before us were laid down.

Mathew L.J. concurred.

Appeal dismissed.

Solicitor for plaintiff: *Wellington Taylor, for Rowlands & Co., Birmingham.*

Solicitor for defendants: *Edward Betteley.*

(1) [1891] 1 Q. B. 638.

A. M.

COVINGTON *v.* METROPOLITAN DISTRICT RAILWAY COMPANY.

1902
Nov. 5;
Dec. 18.

Practice—Taxation—Costs of Inquiry under Lands Clauses Act—Chancery Taxing Masters—Jurisdiction—Lands Clauses Act, 1845 (8 & 9 *Vict.* c. 18), s. 52—*Lands Clauses (Taxation of Costs) Act*, 1895 (58 & 59 *Vict.* c. 11)—*Rules of January*, 1902, *pursuant to Supreme Court of Judicature (Officers) Act*, 1879 (42 & 43 *Vict. c.* 78).

The Chancery taxing masters, whose office is amalgamated with, and who are themselves transferred to, the Central Office by virtue of the General Rules pursuant to Supreme Court of Judicature (Officers) Act, 1879, which came into operation on January 11, 1902, have now jurisdiction to tax the costs of an inquiry before a jury under the Lands Clauses Act, 1845.

Appeal from chambers.

On an inquiry held on April 16, 1902, before the sheriff of the county of London and a jury, for the purpose of assessing the compensation to be paid to the claimant Henry Covington for certain land situate at Chelsea, of which he was the owner and which was taken compulsorily by the respondents for the purposes of their railway a verdict was taken by consent for the sum of 9750*l.* The claimant's costs were taxed by Master Spofforth. Objections to the allowance of certain items were carried in by the respondents on May 21, but except in the case of one item Master Spofforth disallowed the objections. A summons was then taken out by the respondents before the judge at chambers to review the taxation. Ridley J. was of opinion that Master Spofforth, as one of the Chancery taxing masters, had no jurisdiction to tax the costs of an inquiry under the Lands Clauses Act, and ordered that the matter be referred to a master of the King's Bench Division under s. 52 of the Lands Clauses Act, 1845. The claimant appealed to the Divisional Court.

Clayton, for the claimant. Master Spofforth had jurisdiction to tax these costs. Under the Lands Clauses Act, 1845, s. 52, the costs of an inquiry before the sheriff and a jury were to be

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COVINGTON v. METROPOLITAN DISTRICT RAILWAY.

settled by one of the masters of the Court of Queen's Bench, and now, by the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), such costs are to be taxed by one of the masters of the Supreme Court. The question is whether Master Spofforth is now a master of the Supreme Court. The office of master of the Supreme Court was created by the Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78). By that Act (s. 4) was established the Central Office, which by s. 7 was to be under the control of officers called masters of the Supreme Court of Judicature. To that office there were transferred by s. 6 amongst other officers the masters of the Common Law Divisions, but not the masters of the Chancery Division; but by sub-s. (*c*) there were also to be transferred "such other officers of . . . . the Supreme Court . . . . as are from time to time transferred to the Central Office by rules of Court." By s. 12 the several officers of the Central Office were made interchangeable and capable of performing the duties of each other. By s. 22 power was given to make rules of Court for the purposes of the Act. By Order LX., r. 3, of the rules of 1883, "the office of master of the Supreme Court of Judicature shall be deemed to be substituted for the several offices specified in the first part of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879"—which offices did not include that of the Chancery taxing masters. And by Order LXI., r. 1, paragraph 4, of the "Scheme" for the distribution of business amongst the several departments of the Central Office the business of the "taxing" department is specified to be "the taxation of costs in the Queen's Bench Division, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office." But by the Rules of January, 1902 (1), Part I., r. 2, "There shall be transferred to the Central Office (*a*) the existing Chancery taxing masters." And by Part II., r. 5, "Clause 4 of the scheme to Order LXI., r. 1, shall be read as if the words 'in the Queen's Bench Division except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office' were omitted therefrom." Therefore the Chancery taxing masters are now masters of the Supreme Court, and have in common with all the other masters jurisdiction to tax all classes of costs. Then if Master Spofforth had jurisdiction his decision was final, and there was no power in the judge to review the taxation: *Owen* v. *London and North Western Ry. Co.* (1)

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(1) These rules, which are dated December 13, 1901, came into operation on January 11, 1902.

Courthope-Munroe, for the respondents. It is not disputed that if Master Spofforth had jurisdiction his decision is final, but he had not jurisdiction; there is nothing to shew that he is a master of the Supreme Court. The Chancery taxing masters have not been in terms made masters of the Supreme Court. Their transfer to the Central Office is not enough for that purpose. Order LX., r. 3, which deals with the substitution of masters of the Supreme Court for the officers abolished by the Act of 1879, is still in force and unrepealed. Under that rule Chancery taxing masters are not so substituted, and there is nothing in the Rules of January, 1902, to extend that substitution to them. The case of *Owen* v. *London and North Western Ry. Co.* (1) shews that the jurisdiction to tax costs under the Lands Clauses Act was given to the masters of the Queen's Bench, not as officers of the Court, but as personæ designatæ, as being a body of persons specially conversant with the subject. Shee J. there said, with reference to s. 52: "In this section there is no reference to the Court of which the master is an officer, except by way of designating the person who is to settle in case of difference the amount of costs. It seems to me probable that the Legislature, knowing well that the costs of these inquiries before a jury in the matters to which this section applies are costs reasonably taxable upon a different principle, and upon a more liberal scale than between party and party in an ordinary suit, has selected the master of the Court of Queen's Bench as a person, probably above all others, competent to take a reasonable view of what the costs in this exceptional description of business, as to the attendance of witnesses and employment of counsel, should be." And Lush J. said: "The 52nd section merely directs that the costs of the inquiry, in case of difference, shall be settled by one of the masters of the Court of Queen's Bench. That is a designation of a person, not as an officer of the Court, subject to the control and regulations of the Court to which he belongs, but because he is a person conversant with the taxation of costs, and is versed in the taxation of costs." That decision is equally applicable to the Lands Clauses (Taxation of Costs) Act, 1895. The jurisdiction which is thereby given to the masters of the Supreme Court is given to them, not as officers of the Court, but as individuals who by reason of their filling that office are presumed to have special knowledge, and the Rules of January, 1902, are not to be understood as transferring that jurisdiction to the Chancery taxing masters, who had not that special knowledge.

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(1) (1867) L. R. 3 Q. B. 54.

Clayton, in reply.

Cur. adv. vult.

Dec. 18. LORD ALVERSTONE C.J. This was an appeal from an order of Ridley J. made on June 24, 1902, setting aside a taxation of costs by Master Spofforth, and ordering that a new taxation should take place before a master of the King's Bench Division upon the ground that Master Spofforth had no power to tax the bill.

The costs were incurred in an ordinary compensation case in respect of land taken by the Metropolitan District Railway from a person of the name of Covington. By s. 52 of the Lands Clauses Act, 1845, it was provided that the costs of any inquiry as to compensation before a jury should in the case of difference be settled by one of the masters of the Court of Queen's Bench. By the Lands Clauses (Taxation of Costs) Act, 1895, it was provided that, where under the Lands Clauses Act, 1845, any question of disputed compensation has to be determined by the verdict of a jury or by arbitration, the costs of and incidental to the inquiry or arbitration award shall, if either party so require, "be taxed and settled as between the parties by one of the masters of the Supreme Court." The questions for our decision are whether under the authority of the Judicature Acts rules can be made empowering the old

Chancery taxing masters to tax costs in proceedings such as the present, and whether the rules which came into operation in January, 1902, are sufficient for that purpose.

The Supreme Court of Judicature (Officers) Act, 1879, established the Central Office. Sect. 5 of that Act concentrated in and amalgamated with the Central Office, among others, the offices of the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, and such other offices of the Supreme Court as might from time to time be amalgamated with the Central Office by rules of Court. By s. 6, sub-s. (*a*), the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions were transferred to the Central Office, which was by s. 7 placed under the control of officers called masters of the Supreme Court of Judicature. By s. 8, sub-s. 1, the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions were to be among the first masters of the Supreme Court, and by s. 9 provisions were made for the future appointments of such masters. Sect. 6, sub-s. (*c*), provided that there should be transferred to the Central Office such other officers of and persons employed in the Supreme Court or the offices thereof as should be from time to time transferred to the Central Office by rules of Court. Sect. 12, sub-s. 1, provides that the business to be performed in the Central Office shall, subject to rules of Court, comprise all the business performed in the offices by or in pursuance of that Act amalgamated with the Central Office. By s. 12, sub-s. 2, it was provided that the officers of the Central Office shall be interchangeable, and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers in relation to the business of the Supreme Court as may be directed by rules of Court, subject to the qualification that the duties required to be performed by any officer transferred to the Central Office by or in pursuance of the Act shall, except so far as they are modified with his consent, be the same or analogous to those which he performed before being so transferred. It is, in my opinion, clear that the provisions to which I have referred authorize the making of rules for the amalgamation with the Central Office of the office of the Chancery taxing masters, and the transfer to the Central Office of the Chancery taxing masters, they being undoubtedly officers of the Supreme Court within the meaning of s. 6, sub-s. (*c*), of the Act of 1879.

The only remaining point requiring consideration is whether the new rules which came into operation in January, 1902, have empowered the old Chancery taxing masters to perform the duties up to that time performed by the masters of the Supreme Court. That a rule which in terms said that the officers of the taxing department of the Central Office should tax those costs would be intra vires is, in my opinion, clear for the reasons I have given. It remains, therefore, only to consider whether the language of the present rules is sufficient to effect the same purpose. Prior to the Rules of January, 1902, the proper person to tax costs under the Lands Clauses Act was, subsequent to the year 1879, a master of the Supreme Court; but his power to tax such costs did not depend upon s. 52 of the Lands Clauses Act alone, but upon the rules of Court made under the Judicature Acts, and particularly those made under the Act of 1879 which established the Central Office: see Order LX., r. 3, made in 1879, as it existed prior to the new rules of 1902. The authority for the masters of the Supreme Court to tax costs under the Lands Clauses Act was derived from the scheme which forms part of rule 1 of Order LXI., also made in 1879, under which the taxing department of the Central Office was charged with the duty of the taxation of costs in the Queen's Bench Division, except such costs as had heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office. Prior to the rules of 1902 the Chancery taxing masters, who were undoubtedly officers of the Supreme Court, were not amalgamated with the Central Office; and it is for this reason that the language of paragraph 4 of the scheme in rule 1 of Order LXI., under the head "Taxing" which I have already quoted, was used until the amendment made by the Rules of January, 1902. One of the objects of the new rules of 1902 was to meet the complaint of want of uniformity in taxations, and for this purpose it was determined to establish an amalgamated taxing department of the Central Office which should perform all the duties hitherto performed by the Chancery taxing masters on the one hand and the masters of the Supreme Court on the other; and this object had to be effected, not by the preparation of a new and complete set of rules, but by the alteration and amendment of the existing rules and orders under the powers of the Act of 1879. Accordingly, the Rules of January, 1902, were made, Part I. of which provided that from January 11, 1902, the Chancery Taxing Office should be amalgamated with, and the Chancery taxing masters transferred to, the Central Office. In order to give the officers of the new taxing office full power to deal with all taxations, paragraph 4 of the scheme in rule 1 of Order LXI. was amended by Part II., r. 5, by omitting the words which I have quoted, which limited the class of cases which should be dealt with in the taxing department. The scheme thus amended imposed upon the officers of the new department the taxation of all costs which had previously been taxed, either by the Chancery taxing masters or the masters of the Supreme Court. By rule 7, rule 18 of Order LXV. was amended in a way which shews that all the taxing officers of the amalgamated taxing department were to have power to deal with all the business of that department. By rule 10, regulation 29 of rule 27 of Order LXV. was repealed, and a new and very important rule as to taxing provided; and by rule 11 a very important addition was made to regulation 37 of rule 27 of Order LXV. Finally, by rule 14, rule 1 of Order LXXI. was amended so as to make it appropriate to the newly established taxing department. I would also point out that the effect of these rules was to make all the taxing officers of the taxing department subject to the provisions of regulation 25 of rule 27 of Order LXV., and, in my opinion, to establish under the name of the Supreme Court Taxing Office one taxing department of the Central Office for the King's Bench and Chancery Divisions, and to make the Chancery taxing masters and the masters of the Supreme Court officers of that taxing department, having each power to discharge the duties of taxation in all matters which had previously been performed by the Chancery taxing masters and the masters of the Supreme Court respectively.

Rule 3 of Order LX., relied on by Mr. Courthope-Munroe, has no bearing upon the point; it was consequential upon the provisions of the Act of 1879, and is in no way inconsistent with the new rules.

It was contended before us that the case of *Owen* v. *London and North Western Ry. Co.* (1) was inconsistent with this view. I am clearly of opinion that that case has no bearing upon the point raised before us. All that it decided was that a master of the Queen's Bench was to be the final authority to settle the costs as between the parties, and has no bearing upon the question of power to make rules under the Judicature Acts imposing the duties previously performed by masters of the Queen's Bench upon other officers.

I am, therefore, of opinion that the rules as they now stand do confer upon old Chancery taxing masters, now transferred to the taxing department of the Central Office, the power and the duty, in common with the other taxing masters of the taxing department of the Central Office, of taxing costs in the proceedings in question. For these reasons I am of opinion that the order of Ridley J. of June 24 should be set aside, and the taxation by Master Spofforth should stand.

WILLS J. After the elaborate discussion contained in the judgment of the Lord Chief Justice I have little to add, but I wish to express shortly in my own way how I have been led independently to the same conclusion. Originally, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 52, such costs as those now in question were to be taxed by one of the masters of the Court of Queen's Bench. Under the provisions of the Judicature Act, 1873, the masters of the Courts of Queen's Bench, Common Pleas, and Exchequer became masters of the respective Divisions of the High Court named after those Courts. By the Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 14, and the first part of the first schedule thereto, the offices of master in each of the three Divisions were abolished, and instead thereof the office of master of the Supreme Court was created, and the then existing masters of the three Divisions were made masters of the Supreme Court.

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(1) L. R. 3 Q. B. 54.

It is unnecessary to go through the ample provisions contained in that Act for the transfer to the masters of the Supreme Court of all the functions vested in and performed by the masters of the three Divisions, or to discuss the question whether the taxation of costs under the Lands Clauses Act, 1845, was by the force of that Act alone transferred to the masters of the Supreme Court, because by the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), it was expressly provided that such costs shall be taxed by one of the masters of the Supreme Court. The office of the Chancery taxing masters was not by the Act of 1879 amalgamated, as were the offices of the masters of the Common Law Divisions, with the Central Office; but by s. 5 power was given to amalgamate by rules of Court with the Central Office any other offices of the Supreme Court, and by rules of Court of January, 1902, amongst other taxing offices of the Supreme Court amalgamated with the Central Office was the Chancery Taxing Office. By s. 12, sub-s. 1, the business to be performed in the Central Office shall, subject to rules of Court, comprise all the business performed in the offices by or in pursuance of this Act amalgamated with the Central Office, and shall be distributed among the several officers of the Central Office in such manner as may be directed by rules of Court.

It seems to me quite impossible to deny that, after the Act of 1895, at all events, the taxation of costs under the Lands Clauses Act, 1845, was to be performed in the Central Office. I should have thought it pretty clear without the Act of 1895, but with it there can be no doubt. Such taxation prior to the Act of 1879 was business which was de facto performed in the office of the masters of the Queen's Bench Division, and nowhere else, and until the order of January, 1902, it was performed by one of the masters of the Supreme Court.

Sect. 12, sub-s. 2, of the Act of 1879 provided that the several officers of the Central Office shall be interchangeable

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with one another, and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers in relation to the business of the Supreme Court as may be directed by rules of Court, subject to the qualification that without his consent no officer transferred to the Central Office shall be called upon to perform duties not either identical with or analogous to those which he performed before the transfer.

Part I., r. 1, of the Rules of January, 1902, which has been already alluded to in general terms, is as follows: "There shall be amalgamated with the Central Office the following offices, viz., the Chancery Taxing Office," and three other taxing offices unnecessary to enumerate. Rule 2 provides that "there shall be transferred to the Central Office the existing Chancery taxing masters," and others also unnecessary to enumerate. Both of these rules are expressed to be made in pursuance of the Supreme Court of Judicature (Officers) Act, 1879. Rule 1 is made under the powers of s. 5, and rule 2 under s. 6, sub-s. (*c*), of that Act. It is, I think, perfectly clear that after these two rules were made the taxation of such costs as are now in question was amongst the different kinds of business capable of distribution by orders of Court amongst the several officers of the Central Office (s. 12, sub-s. 1), and equally clear that the Chancery taxing masters were amongst the officers made (by sub-s. 2) interchangeable with the masters of the Supreme Court, and capable of performing and liable to perform their duties; and I think that if nothing more had been done there would be very strong ground for saying that the Chancery taxing masters had jurisdiction (which is all that is in question here) to tax the costs under the Lands Clauses Act, 1845.

But the matter did not rest there. It was felt, obviously, that it was desirable to bring the orders already cited into harmony with the Rules of the Supreme Court; and accordingly the second part of the Rules of January, 1902, is headed "Rules of the Supreme Court, January, 1902." Up to that time the distribution of business in the Central Office had been regulated by Order LXI., r. 1, which established a department called "taxing department," and the business assigned to it was "the taxation of costs in the Queen's Bench Division except" certain costs unnecessary to enumerate (see clause 4 of the "Scheme," which forms part of the rule). By the new rule of January, 1902, for this limited description of the business assigned to the taxing department is substituted "the taxation of costs," which I cannot doubt means all costs which could be dealt with in the Central Office; and provision is made in a subsequent rule—rule 7—for the convenient arrangement of various classes of taxation, and giving power to the taxing masters, subject to any orders of a particular kind which might be made by the Lord Chancellor, to regulate and distribute the business of the taxing department of the Central Office in such manner and order as they may deem expedient.

There are two enactments under which, as it seems to me, these orders are valid. One of s. 12, sub-s. 2, of the Act of 1879, which empowers and requires the various officers of the Central Office to perform (interchangeably) such duties, and gives them such powers "in relation to the business of the Supreme Court" as may be directed by rules of Court. It seems to me the merest pedantry to say that under the large words "the business of the Supreme Court" this class of taxation, which could only be performed by one of the masters of that Court, and which was (when it had to be done) as much a part of his day's work as the hearing of summonses or anything else that he had to do as a master, was not comprehended. It is true that it has been held under s. 52 of the Lands Clauses Act, 1845, that he was what has been called a "persona designata"; and that being so, he and he alone, could tax, and there was therefore no appeal from him, as in the case of an ordinary taxation in one of the superior Courts. But he was the persona designata only because he was a master of the Court, and the taxation was undoubtedly performed "in his office," and therefore after the Act of 1879 it was to be performed in the Central Office (s. 12, sub-s. 2). The Central Office was the "Central Office of the Supreme Court" (s. 4), and how any part of the business to be performed in it can be excluded from the description of "business of the Supreme Court" I fail to understand. The general object and purview of the Act is to facilitate and improve the arrangements for the business transacted in the various offices of the Court, and as it seems to me requires that the widest meaning be given to such words of which they are capable; and surely it is no unreasonable latitude of interpretation to say that business which must be transacted by one, and might be transacted by any one, of the masters of the Supreme Court, which was confided to him by the Lands Clauses Acts only because he is a master of the Court, falls within the description of "business of the Supreme Court."

It is perhaps worth while to note in passing that the expression in the Lands Clauses Act, 1845, that the costs "shall be settled" by a master of the Court of Queen's Bench is altered in the Lands Clauses (Taxation of Costs) Act, 1895, to "shall be taxed and settled" by a master of the Supreme Court. "Taxation" has a definite legal meaning, and was probably used in this Act with reference to the phrase in Order LXI., r. 1, as it then stood, "taxation of costs in the Queen's Bench Division."

But the second part of the Rules of January, 1902, so far as they touch the matter in question, have another sanction, which as to the matter now in hand seems to me to be absolutely beyond doubt. The Judicature Act, 1875, s. 17, sub-s. 3, gives power to make rules for regulating any matters relating to the duties of the officers of the Supreme Court. The conjoint effect of Order LXI., r. 1, and of the Rules of January, 1902, is to direct that costs of every description shall be taxed in the taxing department of the Central Office, and that the Chancery taxing masters shall belong to that department—a perfectly valid regulation under s. 17, sub-s. 3, of the Act of 1875.

The process appears to me to be clear by which the power to tax, originally vested in a master of the Queen's Bench, became vested in a master of the Supreme Court, and was performed in the Central Office; by which the Chancery taxing masters, if their office should become amalgamated with the Central Office, became themselves capable of being interchanged with the masters of the Supreme Court for all purposes of taxation; and by which their office was in January, 1902, so amalgamated, and they were thenceforward capable of performing and liable to perform all the taxing business which was in fact performed in the Central Office; and, in my opinion, Mr. Spofforth, as one of the Chancery taxing masters, had jurisdiction to tax in the present instance.

CHANNELL J. In this case I have had the opportunity of reading the judgments of the Lord Chief Justice and Wills J., and I agree with them; but I wish to say that I have been more pressed than they appear to be with the difficulties arising from the decision in *Owen* v. *London and North Western Ry. Co.* (1) That case appears to me to decide that the settlement of costs under the Lands Clauses Act, 1845, s. 52, was not made business of the Queen's Bench Court, which the masters transacted as officers of the Court, but work entrusted to them outside their office, although so entrusted because they held that office. Whether we agree with that decision or not, it would after it has stood for so many years be wrong not to follow it now, and I think it would be equally wrong not to apply the same rule to the Act of 1895. It seems to me, therefore, that what we have to find is who are the persons who now come within the description of "masters of the Supreme Court," as used in the Act of 1895. This expression cannot mean merely the persons who in 1895 filled the office, nor can it depend upon the title, for the title might be changed from time to time, and in fact officers performing very dissimilar duties have at various times in the history of our Courts held the title of "master." The expression "masters of the Supreme Court" in the Act of 1895 must therefore, I think, be construed to mean "the persons from time to time filling the office now known and described as masters of the Supreme Court." I think that although the Chancery taxing masters have not had formally conferred on them the title of "masters of the Supreme Court," yet the statutes and rules quoted in the judgments of my Lord and my brother Wills shew that a

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(1) L. R. 3 Q. B. 54.

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Channell J.

Chancery taxing master is now a person who fills the same office and performs the same duties as at the time of the passing of the Act of 1895 were filled and performed by the persons then known as "masters of the Supreme Court," and, consequently, he must now be considered as a persona designata directed by the Act of 1895 to tax and settle these costs. I agree, therefore, with the judgments that have been delivered.

Appeal allowed.

Solicitors for claimant: *Stanley Evans & Co.*
Solicitors for respondents: *Baxter & Co.*

J. F. C.

1903
Jan. 22, 23.

THE COLUMBUS COMPANY, LIMITED v. CLOWES.

Damages—Negligence of Architect in preparing Plans—Plans not used—Nominal Damages.

The plaintiffs employed the defendant to prepare plans for a building to be erected on a site belonging to them. The defendant neglected to measure the site, and, acting on information which was unauthorized by the plaintiffs, prepared plans on the assumption that the site was smaller than it was in fact. The plaintiffs, having paid the defendant for the plans, were unable to raise funds to build on the site, and ultimately parted with it, and then discovered the error in the plans. In an action to recover the money paid for the plans on the ground of a total failure of consideration, or, in the alternative, for damages for negligence:—

Held, that there had not been a total failure of consideration, but that as the defendant had been negligent the plaintiffs were entitled to damages, although, as they had sustained no loss from his negligence, those damages would be only nominal.

ACTION tried before Wright J. without a jury.

In 1897 the plaintiffs became the lessees of a piece of land situate in Carmelite Street, in the City of London, and they employed the defendant as their architect to prepare plans and specifications for a factory and offices to be erected on that site, and to engage a quantity surveyor to take out the quantities from such plans.

The defendant, understanding that the dimensions of the piece of land in question were less than was actually the case, did not measure the land, but prepared specifications and plans in accordance with what he believed to be the dimensions of the site, and employed a Mr. Priestly to take out the quantities from these plans. The plaintiffs, believing that the plans and quantities were correct, paid the defendant 200*l.* and Mr. Priestly 200*l.* in respect of the work done by them. The plaintiffs were, however, unable from lack of funds to erect the buildings as they had intended, and ultimately in 1901 they parted with the lease. It was then discovered that the plans and quantities were incorrect as they did not cover the whole of the site; and the plaintiffs accordingly brought this action, claiming the return of the money paid as having been paid upon a consideration which had wholly failed, or, in the alternative, damages for negligence.

At the trial evidence was given to shew that the defendant had made borings on the site to ascertain to what depth it would be necessary that the foundations should go; and Mr. Priestly stated that the difference in the quantities that he had prepared in accordance with the original plans and those which would be necessary in the case of a building to cover the whole site would be about 40*l.*

Bray, *K.C.* (*F. P. M. Schiller* with him), for the plaintiffs. There has been a total failure of consideration, and the plaintiffs are entitled to recover back the money they have paid. Every person employed as an architect or surveyor must use due diligence, and must not rely on the information of others: *Moneypenny* v. *Hartland.* (1) The plaintiffs paid for the plans in ignorance of the facts, and therefore are entitled to get back the money they have paid: *Milnes* v. *Duncan.* (2)

Alternatively, the plaintiffs are entitled to the damages which they have sustained from the defendant's negligence. Those damages are the money paid for the plans, which are absolutely useless. New plans altogether would be necessary, and the quantities would have to be taken out afresh from those plans.

Gore-Browne, *K.C.* (*A. G. McIntyre* with him), for the defendant. There is not here a total failure of consideration. The defendant did work in taking borings to ascertain the necessary depth for the foundations, for which he is entitled to be paid. Nor are the plans worthless. The defendant could have amended them so as to adapt them to the true dimensions of the site, and the evidence shews that they are still of use for taking out the quantities. The plaintiffs are not entitled to sue for the money they have paid for the plans without first returning the plans, which they have not done.

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(1) (1824) 1 C. & P. 352.

(2) (1827) 6 B. & C. 671; 30 R. R. 498.

Assuming that the defendant was negligent in not measuring the site, the plaintiffs have sustained no damage, since they were never in a position to make use of the plans even if they had been correct.

Bray, K.C., in reply. It is immaterial that the plans were not used. They ought to have been reasonably fit for the purpose for which they were supplied: *Jones* v. *Just.* (1) The damages must be taken as accruing at the time of the breach of contract; and the plaintiffs, therefore, are entitled to the value of the plans if they had been correct—that is to say, to the amount which they paid for them.

Cur. adv. vult.

Jan. 23. WRIGHT J. This is a somewhat singular case, and one which, as far as I can ascertain, is not exactly covered by authority. The plaintiffs employed the defendant, who was an architect, to make plans of a building to be erected on a site of which the plaintiffs were the lessees. The defendant appears to have been informed by some person, who had no authority from the plaintiffs to give any such information, that the site in question was of certain dimensions, which were in fact considerably less than the real dimensions of the site. The defendant assumed this information to be correct, and, without taking any steps to measure and survey the site, drew his plans on that assumption. It is not contended that he was right in doing so, and I think it was practically admitted that it was his duty to have surveyed the site and measured it, and taken out the proper dimensions before proceeding with his

(1) (1868) L. R. 3 Q. B. 197.

plans. The consequences of the mistake might have been disastrous; but as a matter of fact the mistake had no effect on the position of the plaintiffs, except that they paid him for plans which were in fact incorrect. The plaintiffs contend that they are entitled to get back the amount which they have paid for the plans because the plans are worthless, and that therefore there is a total failure of consideration. Alternatively, they say that they are entitled to damages for the negligence of the defendant.

I have come to the conclusion that there was not a complete failure of consideration. The design of the plans is, I think, available to some extent for a site of the real size. The quantities have been taken out in accordance with the plans, and on the evidence I am of opinion that a small addition to those quantities would alone be necessary in case of a building of the proper size. Borings have been made with a view to ascertaining the necessary depth for the foundations, and a good deal has been done which is really of the same value as if the plans had been correct. The plaintiffs' claim for damages has, however, to be considered. I think it is plain that they are entitled to some damages. The defendant acted negligently, and in the cases such as those against solicitors where negligence is proved the plaintiff is entitled to some damages. But, in order to say what those damages should be, it is necessary to divide the case. With regard to the borings and other work done by the defendant, I think, as I have said, that the plaintiffs got full value. But what as to the plans themselves? I have no evidence before me that the plans, whether correct or not, have any value in themselves, and I am therefore thrown back on general principles. It seems to me that the most that the plaintiffs can get is the reasonable cost of making the plans good. But there comes the difficulty. The defendant himself would have made the plans good without any charge. Indeed, he would have been bound to do so. If, however, the plaintiffs had called in another architect, he would in all probability have insisted on commencing the plans de novo, and would have refused to make any use of the defendant's plans. But would that have been a reasonable

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course to pursue? I do not think that it would. One of the first principles of the law of damages is that a plaintiff who has suffered damage must act reasonably, and not incur unnecessary expense against the defendant. It is clear that the plaintiffs suffered no real damage, since they were never in a financial position to make use of the plans. I think, therefore, that they are only entitled to nominal damages.

The question of quantities is, however, on a different basis. They were necessary in order to enable the plaintiffs to get tenders for the execution of the work, and I think that the plaintiffs are clearly entitled to the cost of adapting them. The evidence shews me that the cost of doing so would be 40*l.*; and I therefore give judgment for the plaintiffs for 40*l.* in respect of the quantities, and 40*s.* in respect of the plans. Whether the action be one of contract or of tort, it is clearly one which is rightly brought in the High Court.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Jacobs & Joseph.*

Solicitors for defendant: *Loughborough, Gedge, Nisbet & Drew.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.

1902
Nov. 17.

1903
Jan. 19.

AUSTRIAN LLOYD STEAMSHIP COMPANY *v.* GRESHAM LIFE ASSURANCE SOCIETY, LIMITED.

Arbitration—Staying proceedings—Submission—Agreement to refer Disputes to Foreign Court—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 4, 27.

A policy of life insurance was effected by a foreigner with an English insurance company, which had a branch office at Budapest. The policy, which was in the French language, provided that the premiums and insurance money should be payable at Budapest, and contained a condition, of which the English translation was as follows: "For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters":—

Held, that the above-mentioned condition constituted a "submission" within the meaning of s. 4 of the Arbitration Act, 1889.

APPEAL against an order of Darling J. at chambers refusing to stay proceedings in an action upon a policy of life insurance.

The plaintiffs sued as assignees of the policy, which had been effected by one Rabl, a native of Trieste, since deceased, who had been the chief cashier of the plaintiffs at Constantinople, upon his own life with the defendants, who were an English insurance company, having a branch office at Budapest in Hungary. The policy, which was in the French language, bore an English stamp, was sealed with the defendants' English seal, and was dated "Londres." It was made subject to certain general conditions in print annexed thereto. By these conditions the premiums and insurance money were made payable at Budapest. The 24th condition, which was one of a group of conditions headed "Domicile," was as follows: "24. Pour toutes contestations qui pourraient surgir du contrat d'assurance toutes les parties intéressées se soumettent de convention expresse à la jurisdiction des tribunaux compétents de Budapest."

The defendants applied at chambers for an order to stay proceedings in the action under the 4th section of the Arbitration Act, 1889, but the learned judge refused the application. The defendants appealed.

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Upon the appeal coming on for argument on November 17, 1902, the Court of Appeal were desirous of information on the question whether the terms of the 24th condition had any special or technical meaning in the French language in connection with the subject-matter; it was therefore arranged that some expert agreed upon by the parties should make a translation of it, and the further hearing of the appeal was adjourned for that purpose. The parties agreed that Mr. Thomas Barclay, who was an advocate in France, should make the translation of the condition, which he accordingly did as follows: "Residence for purposes of jurisdiction." . . . . "24. For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters."

The appeal again came on for argument on January 19.

Haldane, K.C., and *G. H. Devonshire*, for the defendants. Clause 24 of the conditions of insurance amounts to an agreement by both parties to the contract that any dispute under it shall be determined by the Court having jurisdiction in such matters at Budapest. Such an agreement is a submission to arbitration within the meaning of s. 4 of the Arbitration Act, 1889. It is clear that the meaning of "submission" in that section is not confined to an "arbitration" in the strict technical sense of the term, but includes every case in which the parties have constituted a tribunal for themselves. It was held in *Law* v. *Garrett* (1) that an agreement to submit all disputes to a foreign Court was within the 11th section of the Common Law Procedure Act, 1854. It is submitted that, having regard to the terms of the contract and all the circumstances of the case, the law of Hungary must be taken to have been intended by the parties to govern this contract: *Hamlyn* v. *Talisker Distillery*. (2) That being so, the object of condition 24 clearly was that the Hungarian Courts which administer that law should have exclusive jurisdiction over all questions which might arise under the contract of assurance.

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(1) (1878) 8 Ch. D. 26.

(2) [1894] A. C. 202.

J. A. Hamilton, K.C., and *Leck*, for the plaintiffs. Condition 24 is not a "submission" within the meaning of the Arbitration Act, 1889. It only means that, if, in the case of a dispute, either party elects to invoke the jurisdiction of the Court at Budapest, the other party shall not be at liberty to object to its jurisdiction. Agreeing to submit to the jurisdiction of a Court, if invoked by the other party, is not equivalent to agreeing to refer a dispute to the arbitration of that Court. The defendants are an English company, domiciled in England, which carries on insurance business and invites people to insure at Budapest. The object of the condition plainly is to hold out as an attraction, in order to induce persons to insure with the defendants in Hungary, that they will not have to resort to the English Courts to enforce their policies. It is therefore made a term of the contract that, for the purposes of its enforcement, the defendants shall be regarded as having a conventional domicil in Budapest. But the condition does not provide that the Courts of Budapest shall have exclusive jurisdiction over all disputes arising under the policy. In order that s. 4 of the Arbitration Act, 1889, may apply, there must be an agreement that some person or persons, or body, shall have exclusive jurisdiction over any dispute arising under the contract. The Court have a discretion under the section. If the construction of the condition is not absolutely clear, the Court ought not, as a matter of discretion, to stay proceedings in the action.

[They cited *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1)]

Haldane, K.C., for the defendants, was not called on to reply.

ROMER L.J. This is a simple point; and, though I can understand that different persons might take different views of it, I must say that to my mind the meaning of condition 24 is that contended for by the defendants. The question is this: Does the condition merely mean that, if one of the parties to the contract is sued by the other in the Court of Budapest, he will not take any objection to its jurisdiction; or, does it mean that the parties mutually agree that, if any

(1) [1898] 1 Q. B. 487.

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Romer L.J.

dispute arises under the contract, it shall be determined by the Court in Budapest? Having regard to the nature of the contract and its language, I am of opinion that the latter construction is the correct one. It is not as if the insurance company only had agreed that they would submit to the jurisdiction of the Court at Budapest: both parties mutually agree to submit to that jurisdiction in respect of any dispute which may arise under the contract. If there had been an agreement by the parties in similar terms to submit to the decision of a particular individual, I think there could have been no doubt that it would have amounted to an agreement to submit any dispute under the contract to the arbitration of that person. In this case, instead of nominating a particular individual as arbitrator, the parties agree to submit any dispute arising under the contract to the Courts at Budapest. I think the appeal should be allowed.

MATHEW L.J. I am of the same opinion. It seems to me that the plain meaning of the language of the condition is, not merely that, in the event of a dispute arising under the contract, either party shall have an option of suing in the Court at Budapest having jurisdiction in such matters, but that both parties shall be bound to refer such a dispute to that Court. It is suggested, as a reason why we should give to the condition the meaning contended for by the plaintiffs, that the object of inserting it was that it might operate as an attraction to persons to insure at Budapest with the defendants. I do not, however, see why, in considering the object of the condition, we should look only to the position of the assured. It might often be of great importance to the insurance company, in case of a dispute arising under a policy of insurance effected at Budapest, that they should not have to bring witnesses from thence to distant places. But, whatever the object of inserting the condition may have been, I think that the effect of it is clearly what I have stated.

Appeal allowed.

Solicitors for plaintiffs: *Stokes & Stokes.*

Solicitors for defendants: *Devonshire, Monkland & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.

1902

Nov. 26.

JONES *v.* LAVINGTON.

Landlord and Tenant—Underlease—Covenant for Quiet Enjoyment—Implied Covenant—Implication arising from the Word "Let"—Lawful Interruption by Person claiming under Title Paramount.

By an agreement, not under seal, operating as an immediate demise, the defendant agreed to "let" to the plaintiff certain premises for the term of three years. The defendant was himself a lessee of the premises, which, by the terms of the lease to him, were subject to a restrictive covenant, of which the plaintiff had no notice, as to carrying on any business thereon. The plaintiff entered into possession, and carried on his business on the premises until restrained by an injunction obtained by the superior landlord. In an action for breach of contract for quiet enjoyment:—

Held, that, whether or not any contract for quiet enjoyment could be implied from the word "let," the use of that word did not create an unrestricted contract for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount, and that the plaintiff was not entitled to recover.

Baynes & Co. v. *Lloyd & Co.*, [1895] 2 Q. B. 610, considered.

Application for a new trial, or that judgment should be entered for the plaintiff in an action tried by Grantham J. with a jury.

By an agreement in writing of July 19, 1900, the defendant agreed to let and the plaintiff agreed to take the lower part of a house and premises in Guilford Street, Russell Square, for a term of three years certain, at a yearly rent payable quarterly. The defendant held the premises under a lease from the Foundling Hospital of April 7, 1893, which contained a covenant binding the defendant and his assigns and all persons deriving title under him not to convert, use, or occupy, or permit the house or premises, or any part thereof, to be converted, used, or occupied for the purpose of any trade or business, or otherwise than as a private dwelling-house, and also a proviso for re-entry by the governors of the Foundling Hospital for breach of the above-mentioned covenant.

The plaintiff, who had no notice of the restrictive covenants, carried on the business of a brass-founder and metal-worker, and acquired the premises with the intention of residing in one part and using the remainder as show-rooms and offices in connection with his business, and he fitted up the premises accordingly and carried on his business there. In December, 1901, the governors of the Foundling Hospital commenced an action against the plaintiff and the defendant in the High Court, and obtained an injunction restraining the plaintiff from carrying on his business on the premises as from December 24, 1901.

The plaintiff in his statement of claim alleged that the defendant verbally warranted and falsely represented to the plaintiff that the defendant had good right and title to demise the premises to the plaintiff for the purpose of carrying on his business, and thereby fraudulently induced the plaintiff to take the premises for that purpose; and further, that it was an implied term of the agreement that the plaintiff should and might quietly enter and enjoy the premises during the tenancy and carry on his business thereon. The plaintiff accordingly claimed damages for breach of covenant, or, in the alternative, for breach of warranty and fraudulent misrepresentation.

At the trial the jury returned a verdict for the plaintiff; but, in answer to a question put to them by the learned judge, they negatived fraud on the part of the defendant. The learned judge thereupon entered judgment for the defendant.

The plaintiff appealed.

Witt, K.C., and *R. J. Drake*, for the plaintiff. The use of the word "let" implies a covenant or contract for quiet enjoyment which covers interruption by any person claiming by title paramount. Prideaux, Precedents in Conveyancing, 17th ed. p. 54, points out that an absolute right for quiet enjoyment is implied in every lease whether by deed or parol. In Williams on Real Property, 10th ed. p. 428, it is pointed out that formerly some words used in conveyancing implied a covenant for quiet enjoyment unless followed by an express covenant imposing on the lessor a less liability, and that "demise" is one of these words. In *Mostyn* v. *West Mostyn Coal and Iron Co.* (1) Brett J. said: "I think the case of *Line* v.

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(1) (1876) 1 C. P. D. 145, at p. 152.

Stephenson (1) is an authority to shew that where an indenture of lease contains the word 'demise,' then if there be no express covenant either for title or for quiet enjoyment, there is an implied covenant that the lessor has a good title, and that the lessee shall have quiet enjoyment . . . . The case of *Hart* v. *Windsor* (2) is an authority that the word 'let' has the same effect in this respect as the word 'demise,' and that any other equivalent word would have the same effect." The passage in *Hart* v. *Windsor* (3) which is referred to is: "It is clear that from the word 'demise,' in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,' or any equivalent words (Shep. Touchstone, 272), which constitute a lease, have, no doubt, the same effect, but not more: Shep. Touchstone, 165, 167." The judgment of Kay L.J. in *Baynes* v. *Lloyd* (4) is relied on by the defendant; but the dicta on the point before this Court are explained by reference to the judgment of Lord Killowen C.J. in the Court below (5), and the only judgment given was to the effect that a covenant for quiet enjoyment would not enure beyond the termination of the defendant's own estate. In *Budd-Scott* v. *Daniell* (6) Lord Alverstone C.J. pointed out that *Baynes* v. *Lloyd* (4) is not a direct authority on the point, and should not be treated as a binding authority.

There being a difference of opinion in the Court of Appeal, as appears by the judgments in *Mostyn* v. *West Mostyn Coal and Iron Co.* (7) and *Baynes* v. *Lloyd* (4), it is open to this Court to adopt either view. In addition to the text-books already mentioned, text-books old and new are uniform as to the extent of the covenant or contract to be implied from the word "demise": see Platt on Covenants (1829), p. 46; Woodfall, Landlord and Tenant, 17th ed. p. 757; Foà, 3rd ed. p. 130.

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(1) (1838) 5 Bing. N. C. 183.

(2) (1843) 12 M. & W. 68.

(3) 12 M. & W. at p. 85.

(4) [1895] 2 Q. B. 610.

(5) [1895] 1 Q. B. 820, at p. 826.

(6) [1902] 2 K. B. 351, at p. 358.

(7) 1 C. P. D. 145.

If, then, the covenant implied by the use of the word "demise" covers interruption by title paramount, and the word "let" is an equivalent word, the plaintiff is entitled to judgment.

[They referred also to *Hancock* v. *Caffyn* (1) and *Holder* v. *Taylor*. (2)]

Trevor Lloyd, for the defendant, was not called on to argue.

COLLINS M.R. This is an appeal from a decision of Grantham J. in a case tried before him with a jury.

The action was brought for fraudulent misrepresentation of title, said to have been made by the defendant as lessor, at the time at which a contract of letting was entered into between him and the plaintiff as lessee, and on an implied contract for quiet enjoyment.

The jury, after direction from the learned judge, found in favour of the plaintiff; but on a question being put to them after they had given their verdict, they said that they did not impute fraud to the defendant, and the learned judge entered judgment for the defendant.

The question now is whether, under those circumstances, the plaintiff is entitled to have the judgment set aside and judgment entered for him, or a new trial.

I am of opinion that the appeal fails. The first contention was that there was a collateral agreement as to quiet enjoyment which could be taken into consideration and enforced. That, however, was hardly pressed upon us, because it was obviously untenable. Such an agreement, if there was one, was in reference to the subject-matter itself of the contract, and must be found in it.

That failing, the main point argued before us was that out of the terms of the agreement itself there could be implied a contract for quiet enjoyment, not merely a limited contract covering acts of the lessor and persons claiming under him, but an unrestricted contract as to acts done by all persons whatsoever.

That contention seems to me to be met directly by the authority of this Court in the case of *Baynes* v. *Lloyd*. (3) In

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(1) (1832) 8 Bing. 358.

(2) (1613) Hob. 12.

(3) [1895] 2 Q. B. 610.

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that case Kay L.J., in an elaborate judgment, which was that of the Court of Appeal, came to the conclusion which is stated in the head-note: "*Held*, that, assuming that in the absence of the word 'demise' either of such covenants"—that is, for title and for quiet enjoyment—"could be implied in the lease, the duration of the covenant was limited by that of the lessor's own estate, and that consequently the plaintiff could not recover." That no doubt is the point actually decided, but the Lord Justice in the course of the judgment considered what is the effect, in a lease for years, of the word "demise," and also of other words raising an implied covenant for quiet enjoyment; and the conclusion arrived at was that, as it is put on p. 615: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." It seems to me clear from the earlier part of the judgment that he did not regard "let" as one of those words, and accordingly he takes exception to the view of Parke B. in *Hart* v. *Windsor* (1) that "let" was equivalent to "demise." So it stands thus, as it seems to me, on that authority, that, whether or not any contract is to be implied out of the use of the word "let," there certainly is not to be implied out of it a contract against the acts of persons not claiming under the lessor, and that is enough to decide this case. Even if we were at liberty to go into the authorities again, it clearly would be unbecoming in this Court to call in question the considered opinion of the three judges of the Court of Appeal, though the actual decision in that case might have been arrived at without going into that part of the case.

It is enough to say here that the plaintiff, as his counsel admit, cannot succeed unless he can shew an unlimited contract or covenant, and the authorities seem to me as they now stand to be against such a contention.

There is a point which has been raised in the course of the argument on which it is not necessary to give an opinion, but I may say that there is the judgment of Sir G. Jessel in

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(1) 12 M. & W., at p. 85.

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Patman v. *Harland* (1) upon the matter, namely, that the tenant must be taken to have notice of the terms of the head lease. That case no doubt arose under somewhat exceptional circumstances. I do not rest my decision upon that ground, which has not been thoroughly discussed before us, but I confine it to the grounds that I have stated, and on those I think the appeal should be dismissed.

ROMER L.J. I am of the same opinion. The jury have negatived the suggestion of the plaintiff that there was any fraudulent representation made to him by the defendant. It is also clear on the facts that there cannot have been any collateral warranty on which the plaintiff can sue. Therefore the plaintiff was obliged to rest his case on the ground of implied covenant for quiet enjoyment. I wish to point out that we are not dealing in this case with an agreement to grant a future lease. It was an agreement which was intended to operate, and did operate, as an immediate letting. That being so, I am of opinion, on the authorities, that in such a lease as we have here, the agreement for letting operating immediately, there cannot be implied from the covenant to let and the use of the word "let" an unlimited covenant at law either for quiet enjoyment or for title. To my mind the covenant for quiet enjoyment, if one could be implied, would be limited to the acts of the lessor or those claiming under him, as the Master of the Rolls has pointed out.

There was another objection, as to the tenant having notice of the terms of the head lease, on which the plaintiff's case would fail; but I need not go into that, and the appeal will be dismissed.

MATHEW L.J. I agree for the reasons given by the Master of the Rolls and the Lord Justice.

Appeal dismissed.

Solicitors for plaintiff: *Colyer & Colyer.*
Solicitors for defendant: *Harratt & Pollock.*

A. M.

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(1) (1881) 17 Ch. D. 353.

[IN THE COURT OF APPEAL.]

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1902
Dec. 13.

REES *v.* THE PENRIKYBER NAVIGATION COLLIERY COMPANY.

Employer and Workman—Compensation—"Dependants"—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2; *Sched. I., clause* 1 (*a*), (*ii.*).

A pauper inmate of a workhouse, towards whose maintenance no contribution is in fact made by his son, is not as a matter of law in part dependent on the son's earnings within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, notwithstanding the son's indirect obligation under the poor law to contribute to his father's maintenance.

Appeal of the applicant from a decision of the judge of the county court of Glamorganshire holden at Mountain Ash upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was the father of a workman who had died in consequence of an accident arising out of and in the course of his employment by the respondents, and his application for compensation was based upon the ground that he was in part dependent on the earnings of the deceased within the meaning of s. 7, sub-s. 2, of the Act. The applicant, who was blind, had been in 1897 for some months an inmate of the workhouse, during which time the deceased had, under an order of justices, contributed 1*s.* 6*d.* a week through the relieving officer towards his maintenance. In the year 1899 the deceased and the applicant both lived for a time with a married daughter of the applicant, the deceased paying his sister 8*s.* a week towards the applicant's support. From May, 1900, to May, 1901, the applicant lived with another married daughter, to whom the deceased paid 7*s.* or 8*s.* a week for his father; he also paid for his clothes. In May, 1901, the applicant again went into the workhouse, and there remained until after his son's death on January 15, 1902; during this period the deceased did not in fact contribute towards the applicant's maintenance, nor was any order for contribution made upon him by the justices at the instance of the guardians. The county court judge found that the applicant was not a dependant within the meaning of the Act, and made an award in favour of the respondents. The applicant appealed.

S. T. Evans, K.C., and *John Sankey*, for the applicant. The decision of the county court judge was wrong. The applicant was in part dependent upon the earnings of the deceased at the time of his death, within the meaning of s. 7, sub-s. 2, of the Act, and of clause 1 (*a*), (ii.) of the 1st schedule. A legal obligation to maintain, coupled with ability to contribute towards the maintenance, is sufficient to create a state of dependency.

[ROMER L.J. Here the son was not legally liable to maintain his father. Must you not, therefore, make out a state of actual dependency at the time of the death?]

No; it is not necessary that there should be actual dependency in the sense that the deceased is at the time of his death in fact contributing to his father's support. Though there was no direct liability upon the deceased to maintain his father, he was bound, upon his father's becoming chargeable to the parish, to contribute to his maintenance, and the latter was to that extent dependent on him.

[They cited *Cunningham* v. *McGregor & Co.* (1); *Main Colliery Co.* v. *Davies* (2).]

Ruegg, K.C. (*Albert Parsons* with him), for the respondents. The question is one of fact: *Main Colliery Co.* v. *Davies.* (2) It is not sufficient that there is an indirect obligation to contribute to the applicant's maintenance, which might have been enforced by the poor law; that cannot constitute dependency at the time of death.

[He was stopped by the Court.]

COLLINS M.R. The applicant claimed to be a dependant of the deceased, and the county court judge found as a fact that he was not. Unless we are of opinion that this finding involves a misdirection, or misconception, in point of law, we are of course bound by it; this rule is especially applicable to the question whether one person is a dependant of another within this Act, which has been held by the House of Lords in *Main Colliery Co.* v. *Davies* (1) to be a question of fact. Here the applicant was in the workhouse at the time of his son's death, and the only ground on which he can claim to be a dependant is that he belongs to one of those classes of relatives to whom the expression "dependant" is confined by this Act. The claim involves the contention that, where a person is an inmate of a workhouse, and there is another person outside against whom a liability under the poor law to contribute to his support could be enforced, the former must as a matter of law be dependent on the person outside. But this is contrary to the express language of the statute. The definition of "dependants" in s. 7, sub-s. 2, is: "Such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death," and the 1st schedule, in clause 1 (*a*), (i.), (ii.), deals with dependants who are "dependent upon his earnings at the time of his death," while clause 1 (*a*), (ii.), which deals with partial dependency, further provides that the compensation, if determined on arbitration under the Act, is to be "reasonable and proportionate to the injury to the said dependants." Both s. 7 and the 1st schedule obviously contemplate persons who are actual dependants on the deceased; and a person is not in a state of actual dependence on his relations where he is being maintained by the guardians and not in any sense by them; it makes no difference to them from a pecuniary point of view whether he lives or dies. It is impossible to lay down as a matter of law that under such circumstances the one must be a dependant upon the other.

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(1) (1901) 3 F. 775.

(2) [1900] A. C. 358.

Romer L.J. I agree that the judgment of the county court judge is right, and that the applicant is not brought within the definition of dependant in s. 7, sub-s. 2, of the Act. He was not dependent upon the earnings of the workman at the time

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(1) [1900] A. C. 358.

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of his death. If he could technically bring himself within the definition, it would avail him nothing; for it is impossible that under such circumstances there could have been any injury to the applicant by the death of the workman within the meaning of Sched. I. (1), (*a*), (ii.).

Mathew L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for applicant: *Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for respondents: *H. P. Becher, for Simons & Powell, Pontypridd.*

W. J. B.

1902
Dec. 15.

[IN THE COMMERCIAL COURT.]

In re An Arbitration between THE NEWMAN & DALE STEAMSHIP COMPANY, LIMITED and THE BRITISH AND SOUTH AMERICAN STEAMSHIP COMPANY.

Ship—Charterparty—Exceptions—Applicability to Charterer.

The exception of fire in a charterparty enures for the protection of the charterer as well as the shipowner.

Award stated by an umpire in the form of a special case.

By a charterparty, dated July 16, 1901, between the Newman & Dale Steamship Company, Limited (the owners), and the British and South American Steamship Company (the charterers), it was provided that the steamship *Aqua* should proceed to New York and load a full and complete cargo of hay, alfalfa, and/or bran, and being so loaded proceed to Table Bay for orders, to discharge always afloat at one or two ports between Cape Town and Delagoa Bay and there deliver the same. The charterparty provided (by clause 8) that twenty-four weather working days (Sundays and holidays excepted) should be allowed for loading and discharging cargo, after which demurrage was to be paid at the rate of 45*l.* per running day; time in shifting ports not to count as lay-days.

Clause 11 of the charterparty, which contained the exceptions, was as follows: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners; ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, nor resulting from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager."

The cargo was shipped under a bill of lading dated August 12, 1901, and was delivered as hereinafter mentioned at East London to the British Government, the consignees of the cargo.

The vessel sailed from New York on August 13, 1901, and arrived in Table Bay on September 22, when she received orders to proceed to East London and discharge. Five lay-days were occupied in loading at New York. She arrived at East London on September 26, and notice was at once given to the representative of the British Government at that port, but she did not begin to discharge until October 13. On October 16 fire broke out in the cargo, and the vessel was ordered away from the discharging berth by the consignees and removed to an anchorage in the river. She continued at her anchorage discharging damaged hay and coals into lighters until November 3, when, notice having been given to the consignees that all damaged cargo had been discharged, she was again ordered to her discharging berth, and continued discharging undamaged cargo until November 7, when the whole of such cargo was discharged. Some further damaged hay was then found in the vessel, and she was again moved from the discharging berth to an anchorage in the river, when she proceeded to discharge the said damaged cargo, and completed the discharge on November 11. During the discharge the owners

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demanded demurrage from the charterers; and the latter paid certain sums under protest, and claimed to recover the same or a portion thereof, or to deduct the same from the balance of freight as having been improperly demanded.

The owners having brought an action to recover the balance of freight and demurrage, the action was stayed and all matters in dispute referred to arbitration; and, the arbitrators having differed, the umpire made his award in the form of a special case. The only question was as to the amount of demurrage payable to the owners by the charterers. The owners claimed twenty-eight days at 45*l.* a day, and the charterers admitted two days sixteen hours. If the owners' claim was correct there remained a balance due to them in respect of freight and demurrage of 1091*l.* 13*s.* 11*d.*, and if the charterers' allowance was correct no sum remained due to the owners. The amount of demurrage depended partly on questions of fact not material to this case, and partly upon the question of law hereinafter stated.

It was contended on behalf of the charterers that the exception of fire in the charterparty applied to the obligation of the charterers to discharge, and that they were excused by the occurrence of the fire from all demurrage caused by it. It was contended on behalf of the owners that the exception did not apply to the charterers' obligation to discharge, and that the charterers were not thereby excused from liability for demurrage occasioned by the fire.

The umpire found as facts that it was necessary to remove the vessel from her discharging berth in consequence of the fire, and that the damaged hay required a longer time to discharge than if it had been sound, and that there was a necessary delay of seven days in consequence of the fire. He also found that there was a further delay by reason of the following circumstances. After the fire had been extinguished and the vessel could have been safely brought back to a discharging berth, the consignees continued to discharge the damaged hay into lighters in the river instead of bringing her back and continuing the discharge at the berth. This course was adopted because the hay was damaged and worthless to the consignees, and was under the circumstances a reasonable course for them to pursue, but it was not necessary in consequence of the fire. The delay so caused amounted to ten days. The charterers contended that they were freed from any liability for demurrage in respect of both the periods of seven and ten days by reason of the exception of fire, and the question for the opinion of the Court was whether the contention of the charterers was correct as to one or both of the said periods.

J. A. Hamilton, K.C. (*Noad* with him), for the shipowners. In any event the charterers cannot be held excused by reason of the exception for the ten days' delay, for it is found as a fact that that delay was not rendered necessary by reason of the fire. Nor are they excused in respect of the seven days' delay while the damaged cargo was being discharged, although that delay was caused by the fire. The exception of fire in the charterparty does not apply to the charterers' liability to discharge; it is inserted for the protection of the shipowners only; this is apparent from its language, for the exception is not expressed to be mutual. Clause 8 of the charterparty expressly binds the charterers to load and discharge in a certain number of days, and they cannot cut down this express obligation by bringing in an excepted peril, which is excepted in a separate and distinct clause, where the exception is in respect only of the liability of the ship. In order that the exception may enure to the benefit of the charterers, the intention must appear in clear and unambiguous language. In the large majority of the decided cases the exceptions are intended to be exceptions on the shipowner's liability for safe delivery of the cargo: *Blight* v. *Page* (1), where it was held that an exception in a charterparty of restraint of princes did not relieve the charterers of their obligation to load a cargo: *Touteng* v. *Hubbard* (2), where the same doctrine was applied in the case of an embargo laid on by the Government of the country in which the contract was made. The only case in

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(1) (1801) 3 B. & P. 295, n.; 6 R. R. 795, n.

(2) (1802) 3 B. & P. 291; 6 R. R. 791.

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which an exception has been held to be intended for the protection of the charterer as well as of the shipowner is *Barrie* v. *Peruvian Corporation* (1), where the charterer, who had been prevented from loading a cargo by reason of the destruction of the landing-place by a tidal wave, was held excused by reason of the exception of "act of God" in the charterparty. That decision is contrary to the whole current of authority. It is also distinguishable; for clause 20 of that charterparty, which contained the exception, began by dealing with the obligations of both parties and imposing a penalty for non-performance; the clause indicated the existence of a mutual obligation, as was pointed out by Mathew J. in his judgment. In *Hulthen* v. *Stewart* (2) it was held that an obligation to discharge according to the terms of the demurrage clause must be enforced without reading into it a strike clause so as to alter its normal meaning when construed by itself. An express undertaking to do a thing in a given time is the basis of the charterer's liability, which can only be got rid of under the exception clause if an intention to that effect is clearly indicated.

Carver, K.C. (*F. E. Smith* with him), for the charterers. The only distinction between the present case and *Barrie* v. *Peruvian Corporation* (1) is that here the exception clause is split up into several separate clauses. It is not necessary that the exceptions should be expressed to be mutual; that is only necessary where the clause would otherwise be ambiguous. In old times the position in a charterparty of the exception clause was such that it could only apply to the liability of the shipowners, and this is the reason for the early decisions. *Blight* v. *Page* (3) and *Touteng* v. *Hubbard* (4) are not authorities in the present case.

[BIGHAM J. Has it not always been considered that the exceptions are introduced for the protection of the shipowner?]

That is not the view of the authorities: Scrutton on Charterparties, 4th ed. pp. 168, 174; Carver on Carriage of Goods by Sea, 3rd ed. s. 150. Looking at the scheme of this charterparty as a whole, it is clear that the clause of exceptions as far as the word "shipowners" is general and applies for the protection of both parties; from that word it in terms applies to the shipowners only. Further, the exceptions apply to excuse the charterers, not only in respect of the seven days, but of the ten days also; substantially the finding of the umpire is that it was a reasonable course for the charterers to pursue.

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(1) (1896) 2 Com. Cas. 50.

(2) [1902] 2 K. B. 199.

(3) 3 B. & P. 295, n.; 6 R. R. 795, n.

(4) 3 B. & P. 291; 6 R. R. 791.

Noad, in reply, referred to *Thiis* v. *Byers* (1); *Smith* v. *Dart & Son.* (2)

BIGHAM J. The question that I have to decide is whether the exception in the charterparty with reference to fire enures to the benefit of the charterers as well as the shipowners. If I had to decide this case without reference to authority, I should certainly be of opinion that all the exceptions in clause 11 of this charterparty were intended to apply exclusively for the protection of the shipowners; I have always understood that such clauses are inserted by the shipowner for his own benefit, and for his own benefit only. But the case is not devoid of authority. There is the decision in a contrary sense of Mathew J. in *Barrie* v. *Peruvian Corporation* (3), and having that case before me I do not think that I ought to decide this case according to my own view of the contention of the parties, for I am unable to satisfactorily distinguish the two cases. If that decision is right, it seems to me to follow that the exception in clause 11 must be applied for the mutual benefit of both shipowners and charterers. It is a well-known fact that the charterer not infrequently introduces into a clause of this kind the word "mutually" for the purpose of acquiring the benefit of the clause, acting probably under the impression that, if he did not do so, he would not get that benefit; and it is the recollection of that fact amongst others that disposes me to say that the clause without the word "mutually" is intended solely for the benefit of the shipowner. But Mathew J. in his judgment in *Barrie* v. *Peruvian Corporation* (3) relies

(1) (1876) 1 Q. B. D. 244.

(2) (1884) 14 Q. B. D. 105.

(3) 2 Com. Cas. 50.

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Bigham J.

upon certain clauses in the charterparty which point to mutuality, and says that he sees no reason why mutuality should not be applied to the clause as to the excepted perils, giving an illustration which in my opinion applies equally to the present case. The learned judge says: "During the argument the question was put: If the cargo had been provided and the lighters had all been sunk"—which of course would have been a peril of the sea—"would the exceptions have applied to protect the charterers? To my mind they would, if it were not for clause 3"; he then refers to that clause. He must have been of opinion that the exception of perils of the sea was intended for the protection of shipowner and charterer alike, and I think I am bound by that authority to say that the exception of fire in this charterparty applies both to the charterers and the shipowners, and that therefore the charterers are entitled to the benefit of the protection given by that clause.

The next question is, What is the nature of the protection given? On the facts as found by the arbitrator, I am of opinion that the charterers are excused from payment for the seven days mentioned in the case. The arbitrator has found that it was necessary to remove the vessel from her discharging berth in consequence of the fire, and that the damaged hay required a longer time to discharge than if it had been sound, and that there was a necessary delay of seven days in consequence of the fire. The facts found bring that part of the case within the exception. As to the other part of the case the arbitrator finds that, after the fire had been extinguished and the vessel could have been safely brought back to a discharging berth, the consignees continued to discharge the damaged hay into lighters in the river instead of bringing her back and continuing the discharge at the berth. That course was adopted because the hay was damaged and worthless to the consignees, and was under the circumstances a reasonable course for them to pursue, but it was not necessary in consequence of the fire. Then he says that the delay there amounted to ten days. I am of opinion that in respect of those ten days the charterers are not excused. The fire was not the operating cause during those days; in other words, the exception has ceased to exist, and is therefore no longer available to excuse the charterers. The fact appears to be that the hay had been rendered worthless, and the consignees chose to throw it overboard, and this they could do much more cheaply and easily, though at considerable delay to the vessel herself, if they threw it overboard at the spot where the ship was lying. As to those ten days, therefore, I think that the charterers are not entitled to rely upon the exception as excusing them from performing a positive contract to discharge the vessel within a certain number of days. There will be judgment for the shipowners in respect of those ten days; but, as each party has partially succeeded, there will be no costs of this argument on either side.

Judgment accordingly.

Solicitors for shipowners: *William A. Crump & Son.*

Solicitors for charterers: *Edwards & Cohen, for Simpson, North, Harley & Birkett, Liverpool.*

W. J. B.

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Dec. 15, 16, 18.

HALBRONN *v.* INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED.

Auctioneer—Advertising Property for Sale—Action by Person claiming to be Owner—Slander of Title—Auctioneer cast in Damages—Liability of Principal.

The defendants instructed the plaintiff, an auctioneer carrying on business in Paris, to advertise for sale a mare which they represented to him was a thoroughbred mare entered and described in the English Stud Book under the name of Pentecost. The plaintiff accordingly advertised the mare for sale as so named and described. A Frenchman, the owner of a thoroughbred mare also called Pentecost, brought an action in France against the plaintiff, alleging that he had suffered damage through the defendants' mare being advertised for sale under that name, and recovered damages. In an action by the plaintiff against the defendants for an indemnity, it was found as a fact that the representation made by the defendants as to the identity of their mare was true:—

Held, that the defendants were not liable, the damages recovered from the plaintiff not being due to any wrongful act on their part.

ACTION tried by Bruce J. without a jury.

The plaintiff was an auctioneer carrying on business in Paris. In October, 1898, the defendants instructed the plaintiff to put up to auction in Paris a mare which the defendants represented to the plaintiff to be, and instructed him to advertise for sale as, a thoroughbred mare named Pentecost, foaled in 1888 by Peter out of Lady Kars, by Mogador out of Belle of Kars by Knight of Kars, and as having been then, in October, 1898, for the first time imported into France. A mare named Pentecost appeared in the English Stud Book under the above description. The plaintiff advertised the mare for sale in his catalogue under the description supplied by the defendants. A French horse-breeder named Delavan, the owner of a thoroughbred mare which had been imported into France in 1893 under the name of Pentecost, and which had been so entered in the French Stud Book, brought an action in Paris against the present plaintiff, alleging that the fact of another mare being advertised for sale under that name had injured the value of his mare and caused him damage.

The French Court gave judgment against the present plaintiff, and condemned him in damages and costs.

The plaintiff claimed in the present action an indemnity and damages.

When a horse entered in the English Stud Book is exported, it is customary to send with it a document called an export certificate, issued by the keepers of the Stud Book, by means of which a foreign purchaser is enabled to register the horse in the Stud Book of his country. It appeared that an export certificate for Pentecost had been issued in error in 1893, when the mare subsequently purchased by Delavan was exported; and Bruce J. found as a fact on the evidence given before him that Pentecost had remained in England until exported by the defendants in 1898; and that the representation as to their mare's identity made by the defendants to the plaintiff was true.

The plaintiff further alleged that the defendants had agreed to supply him with an export certificate for their mare, and that they had failed to do so, and that the judgment of the French Court was due to his inability to produce the certificate; but the judge found as a fact that the defendants had not agreed as alleged.

R. E. Vaughan Williams, for the plaintiff. The plaintiff was employed by the defendants to act as auctioneer on their behalf. As a result of that employment, and through following the defendants' instructions as to advertising the mare, the plaintiff has suffered damage. He is entitled to be indemnified by the defendants against all claims arising out of acts done by him as auctioneer for them: *Spurrier* v. *Elderton* (1); *Adamson* v. *Jarvis*. (2) For the purpose of this case it is immaterial to consider whether the decision of the French Court was right or wrong: *Frixione* v. *Tagliaferro*. (3)

G. A. Scott, for the defendants. The defendants are not liable. They have done no wrongful act, and the damage suffered by the plaintiff was not the consequence of his carrying out their instructions, but was due to the fact that

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(1) (1803) 5 Esp. 1; 19 R. R. 456.

(2) (1827) 4 Bing. 66; 29 R. R. 503.

(3) (1856) 10 Moo. P. C. 175.

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HALBRONN v. INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED.

the French Court came to an erroneous decision as to the identity of the defendants' mare. The risk of suffering damage in circumstances like those of this case is incidental to the business of an auctioneer. There is no authority for holding a principal liable to his agent when the representation, made by the former and acted on by the latter, is true in fact. If the defendants had failed to prove that their mare was the real Pentecost, it may be that on the principle laid down in *Adamson* v. *Jarvis* (1) they would have been liable to indemnify the plaintiff; but that decision has no application to the facts as found in this case.

Vaughan Williams replied.

Cur. adv. vult.

Dec. 18. BRUCE J. read the following judgment:—It was contended by Mr. Vaughan Williams that the mere fact of the employment of the plaintiff as auctioneer by the defendants involved an obligation on the part of the defendants to indemnify the plaintiff against all claims arising out of the plaintiff's conduct as auctioneer in respect of acts done by him within the scope of his authority. I am not prepared to assent to that proposition, although the phrase, claim arising out of the plaintiff's conduct as auctioneer, is a very wide one, and the extent of the proposition depends greatly upon the meaning given to that phrase. If one employ an auctioneer to sell a picture by Constable which is in truth a genuine Constable, and the auctioneer sells it as a Constable, and afterwards the purchaser of the picture brings an action against the auctioneer for falsely selling the picture as a Constable, and succeeds in persuading a jury that the picture is not a Constable, and so recovers damages against the auctioneer, the damages so recovered are damages arising, not from the conduct of the auctioneer, but from a mistaken view of the facts taken by the jury; and if, as I have assumed, the picture were a genuine Constable, the claim for damages would not arise from the mere fact of the sale of the picture by the auctioneer, and the auctioneer would have no claim to recover, against the person who had entrusted him with the sale of the picture, the damages awarded against him by the verdict of the jury. So in the present case, the damages recovered in the French Court against the plaintiff in this action arose, not from any act done by the plaintiff in pursuance of his employment by the defendants, but arose from a mistake as to the identity of the mare Pentecost, arising from the fact that some person in France had procured another mare to be entered in the Paris Stud Book as Pentecost. In my opinion the defendants are in no wise answerable for this mistake, and they cannot be rendered liable to pay to the present plaintiff the damages which the French Court awarded against him. [The learned judge then dealt with the question whether or not the defendants had entered into an agreement as alleged, and, having found as a fact that they had not done so, continued as follows:—]

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(1) 4 Bing. 66; 29 R. R. 503.

I think that the undertaking which the defendants entered into with the plaintiff only extended to this—that the mare was the genuine Pentecost foaled in England in 1888, and for the first time imported into France in 1898. That undertaking was never broken, and in my opinion no ground exists for rendering the defendants liable in the present action. If the defendants had sent the mare to the plaintiff to be sold upon a false description, then the present case would have resembled the case of *Adamson* v. *Jarvis* (1), upon which Mr. Williams relied. But the facts in that case do not, I think, bear any resemblance to the present. So I think the case of *Frixione* v. *Tagliaferro* (2), which was much relied upon by Mr. Williams, has little or no bearing on the present case. That was the case of an action brought by an agent against his principals to recover the amount of damages sustained by him in a suit which he defended on their behalf. In that case the agent was authorized by his principals to sell wheat to arrive in June. His principals neglected to provide wheat for a June delivery, and consequently an action was brought against the agent for breach of contract, and judgment was given in the Tribunal of Commerce of Genoa against him. The agent sued

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(1) 4 Bing. 66; 29 R. R. 503.

(2) 10 Moo. P. C. 175.

1902

HALBRONN v. INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED.

Bruce J.

in the Court at Malta his principals to recover from them the amount in which he had been condemned in the Court of Genoa. The Court at Malta decided that the principals were not liable to reimburse the agent; but on appeal to the Privy Council the decision of the Court of Malta was reversed, and the principals were held liable. In the judgment in this case there is a dictum of the Right Hon. Pemberton Leigh, upon which Mr. Williams placed great reliance; it is as follows (1): "It is said that the sentence of the Court at Genoa was erroneous in law; but this is immaterial . . . . Be that sentence right or wrong, the appellant thereby sustained a heavy loss on behalf of the respondents, and they must bear the consequences." But this dictum must be read in connection with the facts proved in that case; it appeared there that the agent (the appellant) communicated at every step in the action brought against him at Genoa with the respondents and acted with their approval, that he treated the action as their action and that he defended it for them, and that the respondents approved of his conduct on their behalf; and upon this ground I can well understand why it mattered not whether the judgment of the Court of Genoa was right or wrong, because the principals in that case had authorized their agent to defend the proceedings in that Court, and so had rendered themselves liable for the consequences resulting from the judgment of the Court. In the present case the plaintiff has failed, in my opinion, in making out a good cause of action against the defendants, and I must give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Flux, Thompson & Co.*
Solicitor for defendants: *T. H. Hiscott.*

F. O. R.

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(1) 10 Moo. P. C. at p. 200.

Ex parte FRANCIS AND OTHERS.

1903
Jan. 12.

Justices—Musical (Summary Proceedings) Copyright Act, 1902 (2 *Edw.* 7, *c.* 15), *s.* 2—*Seizure of Pirated Copies of Music—Order of Court of Summary Jurisdiction—Summons, Necessity for.*

Where pirated copies of music have been seized by a constable under s. 2 of the Musical (Summary Proceedings) Copyright Act, 1902, a Court of summary jurisdiction has no power to make an order under s. 2 forfeiting, destroying, or otherwise dealing with such copies, unless the person from whom they have been seized has, by means of a summons, been notified of the intention to apply for such order.

CASE stated by a metropolitan police magistrate.

On October 4, 1902, a complaint was preferred at the Marylebone Police Court on behalf of the appellants (a firm of music publishers) under s. 2 of the Musical (Summary Proceedings) Copyright Act, 1902 (1), that certain copies of music then produced before the Court had been seized in pursuance of that section, and the magistrate was asked, upon the production before him of proof that the copies were infringements of copyright, to make an order that they should be forfeited or destroyed or otherwise dealt with, as the magistrate might think fit.

The facts alleged in the complaint were that on October 3, 1902, an authorized agent of the appellants requested a constable in writing to seize the copies of music in question, they being then offered for sale in and along the Kentish Town Road by a person who gave his name and address. The constable thereupon seized the music, but informed the person from whom it was seized of the time when and the place where further proceedings with reference to the seizure under the Act would be taken.

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(1) The Musical (Summary Proceedings) Copyright Act, 1902, s. 2: "If any person shall hawk, carry about, sell or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorized in writing, and at the risk of such owner.

"On seizure of any such copies, they shall be conveyed by such constable before a Court of summary jurisdiction, and, on proof that they are infringements of copyright, shall be forfeited or destroyed or otherwise dealt with, as the Court may think fit."

The music was produced in the police court next morning, and, neither the person from whom it had been seized nor any one on his behalf being then present, the magistrate was asked on behalf of the appellants to proceed at once to make the order provided for under s. 2 of the Act, it being contended that the Act gave him power to make such order ex parte.

The magistrate decided that the Act constituted no departure from the ordinary procedure prescribed by law for Courts of summary jurisdiction, and he, therefore, declined to make any order in the matter until a summons had been served upon the person in whose possession the music had been found calling upon him to shew cause why the order prayed for should not be made.

The decision of the magistrate was based upon the following grounds:—

(*a*) The Summary Jurisdiction Act, 1879, s. 51, sub-s. 3, enacts that "Where in pursuance of" any future Act "any act or thing other than the payment of a sum of money is required or authorized by an order of a Court of summary jurisdiction to be done, ... the Summary Jurisdiction Acts shall apply accordingly."

By s. 50 of the same Act the expression "Summary Jurisdiction Acts" includes the Summary Jurisdiction Act, 1848. Sect. 34 of the same Act provides that "Where a power is given by any future Act to a Court of summary jurisdiction . . . . of requiring any act or thing to be done . . . . other than the payment of money, and no mode is prescribed of enforcing such requisition, the Court may exercise such power by an order or orders."

(*b*) The Summary Jurisdiction Act, 1848, s. 1, enacts that "in all cases where a complaint shall be made to any justice or justices of the peace upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise . . . . it shall be lawful for such justice or justices of the peace to issue his or their summons directed to such person, stating shortly the matter of such . . . . complaint, and requiring him to appear at a certain time and place . . . . to answer to the said . . . . complaint, and to be further dealt with according to law."

Where an application for an order of justices is by law to be made ex parte, the issue of a summons is declared by s. 1 to be unnecessary.

(*c*) The question whether copies of music seized under the Act were in point of law and fact infringements of copyright might prove to be a very difficult and debatable one.

The question for the opinion of the Court was whether the magistrate came to a correct determination and decision in point of law.

Scrutton, K.C., and *Herman Cohen*, for the appellants. The provisions of s. 1 of the Summary Jurisdiction Act, 1848, as to the issue of a summons only apply to cases where proceedings are being taken which will result in some person being "imprisoned or fined, or otherwise punished." Where an order is being asked for, as in this case, not affecting the person himself, but only dealing with his property, a summons is not necessary: *White* v. *Redfern* (1); *Thomas* v. *Van Os.* (2) It may be that, in accordance with the ordinary principles of justice, an order for the destruction of music should not be made unless some notice of the time and place of the proceedings has been given to the person from whom the music was taken; but it is submitted that verbal notice by the constable seizing the music is sufficient. There is no provision in this Act requiring the issue of a summons. The construction placed upon the Act by the magistrate will entirely defeat its object. The Act was intended to put a stop to the sale of pirated music, which was being largely carried on in the streets by hawkers and others. The music may be seized by a constable on the request of the apparent owner of the copyright. It is then to be taken before a Court of summary jurisdiction to be dealt with as directed by a magistrate. If the vendor refuses his name and address, it

(1) (1879) 5 Q. B. D. 15.

(2) [1900] 2 Q. B. 448.

will, in the great majority of cases, be impossible to serve the summons on him, having regard to the class of persons who offer pirated copies of music for sale; consequently, great quantities of music will be accumulated in the hands of the police which cannot be adjudicated upon, and the result will be that the police authorities will decline to put in force the power of seizure.

H. Sutton, by leave, in support of the magistrate's decision. Sects. 1 and 2 of the Act both deal with orders for the destruction of copies of pirated music which have been seized, the only difference between them being as to procedure. Both sections require "proof" that the copies are infringements of copyright, and the use of that word clearly indicates that the person whose property is to be dealt with must be heard in his defence. It is immaterial that the Act does not in terms provide for the issue of a summons, because s. 51, sub-s. 3, of the Summary Jurisdiction Act, 1879, applies the provisions of that Act and of the Act of 1848 to future Acts. The question really is whether it can be inferred from the language of this Act that a magistrate is to have power to make an order under s. 2 ex parte. The only cases in which such an inference ought to be drawn are cases of public interest and paramount necessity, examples of which are to be found in *White* v. *Redfern* (1) and *Thompson* v. *Van Os* (2), where orders were made ex parte for the destruction of unwholesome food. These are extreme cases, and the principle underlying them should not be extended to this Act, which deals with private persons' rights of property, and gives rise to no question of urgent public interest: *Gill* v. *Bright.* (3) It cannot be assumed that the Act will be rendered nugatory owing to the difficulty or impossibility of serving the summons in certain cases. The only result will be that in that event the music will remain in the hands of the police, and, if the vendor subsequently comes forward to claim it, the question can then be dealt with. [He also referred to *Reg.* v. *Davey* (4) and Paley's Summary Convictions, 7th ed. p. 190.]

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(1) 5 Q. B. D. 15.

(2) [1900] 2 Q. B. 448.

(3) (1871) 41 L. J. (M.C.) 22.

(4) [1899] 2 Q. B. 301.

1903

FRANCIS, *Ex parte.*

LORD ALVERSTONE C.J. This case raises a very important point. It has been argued that we ought to depart from a well-known principle of law on the ground that otherwise the object of this Act will be defeated. As I hope to make clear by my judgment, I do not dissent from the view that if it is a necessary implication from an Act that some well-known principle of law must be departed from in order to give effect to the provisions of the Act, then it is the duty of the Court to act upon that implication. Now, it has for many years been a well-established principle of law that legal proceedings affecting the rights of persons as owners of property must not be taken unless notice has been given to those persons, and, as was pointed out by Field J. in *White* v. *Redfern* (1), in the case of proceedings under the Summary Jurisdiction Acts, a summons is the method by which notice is given. A good example of the application of this principle is to be found in *Gill* v. *Bright*. (2) In that case proceedings were taken under an Act which gave power to search premises where it was suspected that excisable liquors were being unlawfully sold, and the Act provided that any liquor so found might be seized and sold. No special procedure was provided, and Lush J., in dealing with the question whether an order for sale could be made ex parte, pointed out that "It is quite clear that before the property of the appellant was forfeited the justices should have given him an opportunity of being heard. Common sense and justice require that this should be so. . . . . Before a man's property can be forfeited, and he be deprived of it, an opportunity must be given him to explain the matter or to shew that the seizure was improper."

There of course are some cases in which it has been decided that proceedings affecting a person's property can be taken and an order made ex parte—as, for example, in *White* v. *Redfern* (1), the decision in which case can now only be supported on the ground of the paramount necessity in the public interest of an immediate destruction of unwholesome food.

That being the principle applicable, the question which we have now to decide is whether it follows as a necessary implication from the language of this Act that a magistrate may make an order ex parte for the destruction of music which has been seized by a constable under the powers conferred by s. 2 of the Act. The Act does undoubtedly go a long way towards interfering with rights of property, because s. 2 provides that the music may be seized from the person offering it for sale, without any warrant, and not under any order of a magistrate, but merely at the request of the apparent owner of the copyright or of his agent, and at his risk. It is to be observed that the only difference between s. 1 and s. 2 is that under the former section the seizure is effected under an order of the Court, and it is material to observe that the latter part of s. 2 is substantially the same as the concluding words of s. 1. No doubt one main object of the Act was to prevent the sale of pirated copies of music in the streets; but under this Act a far greater privilege is conferred upon the owners of musical copyright than is enjoyed by other persons in cases where their rights of property are infringed; and the question which we have to consider is whether it is a necessary implication from the provisions of the Act that the magistrate, on proof of the infringement of copyright, a matter which may involve the consideration of very nice questions of copyright law, is to make ex parte an order which will deprive some person of his property. In my opinion it is by no means a necessary implication that the magistrate is to act ex parte. Again, s. 2 is not confined to cases of hawking music about the street; it deals with selling and offering for sale, and we ought not to put a strained construction upon the section, and depart from the ordinary principles of the criminal law, merely because it is suggested that in certain cases there may be a difficulty in putting the Act into operation. The Act provides a new remedy in Courts of summary jurisdiction, and in the absence of an express enactment, or clear implication, that the magistrate is to act ex parte we must hold that the ordinary procedure of a summons must be followed. Mr. Scrutton did not in fact go so far as to contend that a magistrate could act strictly ex parte, but he said that verbal notice, given by the constable, as to the time when and place where proceedings would be taken, was sufficient. I think that if it had been intended to substitute a verbal notice by a constable for a formal summons issued from the Court, the Act would have contained express language to that effect.

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(1) 5 Q. B. D. 15.

(2) 41 L. J. (M.C.) 22.

That is sufficient to dispose of the case; but I wish to add that I think the case comes within s. 51, sub-s. 3, of the Summary Jurisdiction Act, 1879, and the Summary Jurisdiction Acts therefore apply to this Act, although it contains no express reference to them. Having regard to the language of s. 51, I do not think any such reference was necessary.

I also wish to make it clear that it must not be assumed that I assent to the argument that s. 1 of the Summary Jurisdiction Act, 1848, does not apply to cases where an order is asked for affecting only property. I think the word "person" in that section has a wider meaning than that contended for by the appellants. It is not, however, necessary to decide that point.

For the reasons which I have given I think that the decision of the magistrate was right, and that this appeal must be dismissed.

WILLS and CHANNELL JJ. concurred.

Appeal dismissed.

Solicitors: *Philip J. Rutland; Solicitor to the Treasury.*

F. O. R.

1903
Jan. 15.

BEAUMONT *v.* SENIOR AND BULL.

Practice — Costs — Two Defendants jointly represented — Judgment for one Defendant and against the other—Plaintiff liable to pay half the Costs of the Defence.

Where two defendants are jointly represented by the same solicitor, and judgment with costs is given in favour of one defendant and against the other, the successful defendant is, in the absence of any agreement between him and his co-defendant as to how their costs are to be borne inter se, entitled to recover from the plaintiff half the costs of the defence.

APPEAL of the defendant Bull from the refusal of a county court judge to review the taxation of a bill of costs by the registrar.

The action was commenced in the High Court and remitted to the county court for trial. The plaintiff sought to recover a balance of charges for services rendered and money paid by the plaintiff to or on behalf of the defendant Senior as president, and the defendant Bull as secretary, of an unregistered trade association.

At the trial the same firm of solicitors acted for both defendants, and the same counsel was briefed to represent them. The county court judge gave judgment for the plaintiff against the defendant Senior and in favour of the defendant Bull. No special directions were given as to costs.

The plaintiff brought in his bill for taxation, and the registrar allowed him the general costs of the action against the defendant Senior.

The defendants' solicitors then brought in a bill on behalf of the defendant Bull, claiming the general costs of the action in full against the plaintiff. The registrar allowed only the extra costs caused by the defendant Bull having been joined as a defendant. Objections were then brought in on his behalf, it being contended that he was entitled to half the costs of the defence. The registrar confirmed his decision, and on appeal the county court judge affirmed the principle of taxation adopted by the registrar. The defendant Bull appealed.

Lowenthal, for the appellant. The registrar proceeded on the wrong principle. He based his decision on *Gort* v. *Rowney* (1), which, however, has no application to the present case. The successful defendant is entitled to recover from the plaintiff the costs which have been incurred in his defence. Where several defendants retain the same solicitor, each of them can only be charged with the proportion of the general costs incurred on behalf of all: *In re Colquhoun.* (2) The defendant Bull was, therefore, liable to the solicitor jointly retained for half the costs of the defence; and that being the extent of his liability to the solicitor, he can recover that amount from the plaintiff: *Cain* v. *Adams* (3); *Starling* v. *Cozens.* (4)

Colam, for the respondent. It is admitted that the reason given by the registrar for his decision cannot be supported, but the principle applied by him was right on another ground. Sect. 113 of the County Courts Act, 1888, provides that in the absence of any special direction as to the payment or apportionment of costs they shall follow the event. The "event" in this case was the success of the plaintiff against one defendant, and, there having been no direction by the judge as to the apportionment of costs, the plaintiff is entitled to the general costs of the action: *White* v. *Headland's Patent Electric Storage Battery Co.* (5); *Wright* v. *Bull.* (6) But even if this is not so, it does not necessarily follow that the successful defendant is entitled to recover one-half the general costs. The registrar must consider what were the respective positions of the two defendants as regards liability to their joint solicitor; and in the circumstances of this case the probability is that the defendant Senior undertook the whole liability for the costs of the defence. It is doubtful whether the cases cited, which were all decided previously to the Judicature Act, are any authority as to the practice at the present day.

Lowenthal, in reply, referred to *George* v. *Elston.* (7)

LORD ALVERSTONE C.J. We are of opinion that the order of the registrar cannot be supported on the grounds on which

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(1) (1886) 17 Q. B. D. 625.
(2) (1854) 5 D. M. & G. 35.
(3) (1836) 5 L. J. (K.B.) 252.
(4) (1835) 2 C. M. & R. 445.
(5) [1899] 1 Q. B. 507.
(6) [1900] 2 Q. B. 124.
(7) (1835) 1 Bing. N. C. 513.

1903

BEAUMONT v. SENIOR.

Lord Alverstone C.J.

he based his decision. The principle is that a successful defendant is entitled to recover from the plaintiff the costs which he has incurred in defending the action. The question to be determined in the present case is, What is the amount of those costs? It may be that where two defendants are jointly represented by the same solicitor, and it is agreed between them that one of them shall be liable to the solicitor for all the costs of the defence, then in the event of the other defendant being successful in the action he cannot recover any costs from the plaintiff, not being liable to his solicitor for them; otherwise the successful defendant would be in the position of receiving costs from the plaintiff which he had not incurred in defending the action, and to which, therefore, he was not entitled.

In the present case the registrar did not inquire what was the position of the successful defendant with regard to his liability for costs to the solicitor employed, and we think that the case ought to go back to the registrar. If it be the fact, as was suggested in the argument for the respondent, that the unsuccessful defendant was the person liable to the defendants' solicitor for all the costs of the defence, then it may be that the decision of the registrar was right in the result, and that the plaintiff will only have to pay the additional costs incurred through joining the defendant Bull. But in the absence of any agreement between the two defendants as to how the costs of the defence were to be borne, it is clear, on the authority of the cases to which we have been referred, that each of the two defendants is liable to their solicitor for half the costs of the defence, and that will be the amount of costs which the plaintiff will have to pay the successful defendant.

WILLS and CHANNELL JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Van Sandau & Co., for Mills, Huddersfield.*

Solicitor for respondent: *J. Woodhouse, for C. H. Marshall, Huddersfield.*

F. O. R.

SMITH *v.* GOLD COAST AND ASHANTI EXPLORERS, LIMITED.

1903
Jan. 15.

Frauds, Statute of (29 *Car.* 2, *c.* 3), *s.* 4—*Contract not to be performed within a Year—Employment for one Year—To commence on Day next after Date of Contract.*

A contract to serve for one year, the service to commence on the day next after that on which the contract is made, is not a contract which is not to be performed within a year, within the meaning of the Statute of Frauds, s. 4.

Dicta in *Cawthorne* v. *Cordrey*, (1863) 13 C. B. (N.S.) 406, and in *Britain* v. *Rossiter*, (1879) 11 Q. B. D. 123, approved of and followed.

Appeal of the plaintiff from a decision of the Common Serjeant in an action tried with a jury in the Mayor's Court.

The action was brought to recover damages for breach of an agreement to employ the plaintiff as solicitor to the defendant company. The defence was that there was never any completed agreement between the parties.

The plaintiff's case was that at a board meeting of the defendant company held on December 6, 1901, at which he was present, he was verbally engaged to act as the company's solicitor on the Gold Coast for the term of one year from December 7, 1901.

The Common Serjeant ruled that the agreement set up by the plaintiff was one which was not to be performed within the space of one year from the making thereof within the meaning of s. 4 of the Statute of Frauds, and that, as there was no note or memorandum in writing signed by the defendants or their agent, the action could not be sustained; and he directed the jury on this ground to find for the defendants.

The plaintiff appealed.

The Plaintiff in person stated the facts.

Herbert-Smith, for the defendants. Assuming that there was, as the plaintiff contends, a completed contract made on

December 6, for a year's service from December 7, that is within the statute.

[CHANNELL J. If the term of service was to commence on December 7, the dicta of Willes and Byles JJ. in *Cawthorne* v. *Cordrey* (1) seem to shew that in the opinion of those learned judges an agreement in these terms is not within the statute.]

In *Britain* v. *Rossiter* (2) Brett L.J. commented on these dicta, but he refrained from saying whether or not he agreed with them. The year's service was "from" December 7, 1901; that means that the service was to commence, not on December 7, but on December 8: *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Corporation.* (3) This case, therefore, comes within the decision in *Britain* v. *Rossiter* (2), and the dicta in *Cawthorne* v. *Cordrey* (1) do not apply.

[*Scott Fox, K.C.*, as amicus curiae, referred to *Sidebotham* v. *Holland.* (4)]

The Plaintiff, in reply. The period of service was to commence on, not after, December 7, 1901.

LORD ALVERSTONE C.J. We are of opinion that there must be a new trial in this case. The Common Serjeant directed the jury to find a verdict for the defendants, because, in his opinion, the contract sued upon was one which was not to be performed within the space of one year from the making thereof, and was therefore within s. 4 of the Statute of Frauds. The contract set up by the plaintiff was entered into on December 6, 1901, and by it he was engaged by the defendants to act as their solicitor for a year certain from December 7, 1901. The question is whether that is a contract within s. 4 of the Statute of Frauds.

In one sense the contract may be said to be one which is not to be performed within the space of one year from the date when it was made. It depends upon whether the period of service is to exclude or include the day next after that on which the contract was entered into. It is contended for the defendants that a year's service "from" December 7, 1901, would commence on December 8—that is to say, that the year would exclude December 7, 1901, and would include December 7, 1902. If that is the contract, then it is clear, on the authority of *Britain* v. *Rossiter* (1), that the contract is within the statute, for it was there decided that where the service is to commence on the second day after that on which the contract is made, the contract is one which is not to be performed within a year. But if the contract in this case was for a year's service commencing on December 7, 1901—that is, on the day next after that on which the contract was made—and terminating on December 6, 1902, there is authority for holding that such a contract is not within the statute. In *Cawthorne* v. *Cordrey* (2) it had been ruled at the trial that an agreement made on a Sunday for a year's service to commence on the Monday was not within the statute. In the course of the argument on a rule for a new trial Willes J. said: "If a builder undertakes to build a house within a year, that means a year from the next day"; and Byles J. said: "If you adopt the reasonable rule which excludes fractions of a day, taking the receipt to define the duration of the contract, there would be only three hundred and sixty-five days." These dicta are an expression of opinion in favour of the view that the statute does not apply where the service is to commence on the day next after the agreement. Then Brett L.J. in *Britain* v. *Rossiter* (1), referring to *Cawthorne* v. *Cordrey* (2), said: "There was however a dictum of Willes J., which seems to be supported by the opinion of Byles J.; these are great authorities; and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract; but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half-day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was

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(1) 13 C. B. (N.S.) 406.

(2) 11 Q. B. D. 123.

(3) [1891] 1 Q. B. 403.

(4) [1895] 1 Q. B. 378.

(1) 11 Q. B. D. 123.

(2) 13 C. B. (N.S.) 406.

1903

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founded upon a fiction, namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum, and carry it to the length of a decision. It is not necessary to say so here, because the case has not arisen." The case has now arisen for our decision, and I cannot regard that passage from Brett L.J.'s judgment as being intended to express disapproval of the dicta in *Cawthorne* v. *Cordrey*. (1) On the contrary, I think that these cases shew that a contract for a year's service to commence on the day next after the day on which the contract was made is not an agreement which is not to be performed within the space of one year from the making thereof, within the meaning of s. 4. The contract set up by the plaintiff is, therefore, not of necessity within the statute, and the case must go down for a new trial.

WILLS and CHANNELL JJ. concurred.

New trial ordered. Leave to appeal.

Solicitor for defendants: *H. R. Newson*.

(1) 13 C. B. (N.S.) 406.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1902
Dec. 2.

THE KING ON THE PROSECUTION OF A. W. COBHAM *v.* THE ARCHBISHOP OF CANTERBURY.

Solicitor—Treasury Solicitor—Direction to appear for Subject—Matter in which the Crown has an Interest—Right to Costs.

On a rule for a mandamus to the defendant, in a matter in which the Crown had an interest, the Treasury Solicitor was directed to appear for the defendant, and he accordingly became the solicitor on the record. The rule was discharged with costs. Objection was taken on taxation that the defendant was not entitled to recover costs:—

Held, that the Treasury Solicitor is entitled to act, by direction of the Crown, for a subject, in any matter in which the Crown has an interest, and that the defendant was therefore represented by a duly qualified solicitor, and was entitled to recover his costs from the prosecutor.

APPEAL from an order of Lord Alverstone C.J. on objections taken to the taxation of the defendant's costs by a master.

In the case of *Rex* v. *Archbishop of Canterbury* (1) a rule nisi was granted, at the instance of the prosecutor Cobham, calling on the Archbishop of Canterbury to shew cause why a prerogative writ of mandamus should not issue, in a matter that affected the rights of the Crown. Cause was shewn by the law officers appearing on behalf of the Crown and by counsel on behalf of the archbishop. The solicitor of the Treasury had been directed to take up the case of the archbishop, and he became the solicitor on the record, and instructed counsel on behalf of the archbishop. After argument the rule was discharged, costs being allowed to the archbishop. The master accordingly taxed the costs, and, on objection being taken to the taxation, the Lord Chief Justice refused to refer the matter back to the master.

The prosecutor appealed.

Danckwerts, K.C., and *Morton Smith*, for the prosecutor. After the intervention of the Crown the costs were incurred on behalf of the Crown, and not of the archbishop, since the only authority for intervention is that the Crown is interested. As was pointed out on the argument of the writ of mandamus (*Rex* v. *Archbishop of Canterbury* (1)), the Crown does not in such a case give or recover costs. A further objection to the order as to costs is that the solicitor of the Treasury is not a solicitor who is entitled to appear for an individual, and, therefore, the archbishop was not represented by a solicitor, and cannot recover costs: *Irvin* v. *Sanger*. (2) By 9 Geo. 4, c. 25, a person appointed solicitor to a Revenue department need not be enrolled as a solicitor, but may practise as such solicitor in all Courts in the United Kingdom; but the words "as such solicitor" limit the right to the conduct of business of the department. This is in accordance with the prior Act of 2 Geo. 2, c. 23, s. 28, which expressly limits the right to acting "in their respective offices only." The Solicitors Act, 1843 (6 & 7 Vict. c. 73), by s. 2 enacts that no person is to act as an attorney or solicitor unless admitted and enrolled; but by s. 47 that Act is not to extend to solicitors of branches of Her Majesty's Revenue, the solicitor of the City of London, the assistant of the Admiralty, or to the solicitor to the Board of Ordnance. It could hardly be contended that if the City solicitor were directed by the corporation to take up the case of an individual that he would be the solicitor of that person, so as to entitle him, if successful, to costs. By the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, a penalty is imposed for wrongfully acting as attorney or solicitor—that is, without a stamped certificate—but appointment as solicitor to a number of public departments is to be treated as a qualification. By the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), the Treasury Solicitor is constituted a corporation sole, with certain powers and duties in respect of public matters. A consideration of these statutes indicates that the Treasury Solicitor can only act in his official capacity, and cannot act as solicitor for a private individual.

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(1) [1902] 2 K. B. 503.

[They cited *Dixon* v. *Farrer* (3); *Reg.* v. *Buchanan* (4); *Fowler* v. *Monmouthshire Canal Co.* (5); *Moore* v. *Smith*. (6)]

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(1) [1902] 2 K. B. 503.
(2) (1888) 58 L. J. (Q.B.) 64.
(3) (1886) 17 Q. B. D. 658; 18 Q. B. D. 43.
(4) (1846) 8 Q. B. 883.
(5) (1879) 4 Q. B. D. 334.
(6) (1859) 1 E. & E. 597.

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Sir E. H. Carson, S.-G., and *H. Sutton*, for the defendant. The Crown was interested in the application against the archbishop; but the interests of the Crown and the archbishop were not necessarily identical. The Crown intervened to support the archbishop's case and undertook to conduct the defence. Without such intervention the archbishop would have been entitled to his costs, and it is difficult to see on what principle he should be in a worse position because the Crown, in exercise of its right to do so, has intervened on his behalf. Certainly no principle exists that a person to be entitled to his costs must shew that he is personally liable to his solicitor for them. The argument must come to this—that the Treasury Solicitor cannot recover the costs because he is not certificated; but this is directly opposed to the statutes that have been cited, which make his appointment a qualification to act as a solicitor. The statute 9 Geo. 4, c. 25, expressly gives power to act "as such solicitor" under the orders and directions of the Commissioners of the Treasury.

Danckwerts, K.C., in reply. The prosecutor is not seeking, as suggested, to deprive the archbishop of his costs, which would be paid out of public moneys, but is raising an objection to paying costs to the Crown. The Crown was under no obligation to intervene, and if it does so its intervention is subject to the privileges and disabilities attaching to its position. The case of an indemnity is not in point, because here the Crown took the case out of the hands of the archbishop. The expression "such solicitors" in the Act 9 Geo. 4, c. 25, is governed by the antecedent words, "on behalf of His Majesty," and does not give any other right than that of appearing for the Crown.

Collins M.R. This is an appeal from a decision of the Lord Chief Justice in chambers, whereby he refused to entertain certain objections to costs allowed by a master. The question arises in this way: One Captain Cobham obtained a rule for a mandamus to the Archbishop of Canterbury. The Crown, being interested in the matter, appeared to shew cause on its own behalf, and also exercised the right, which has been

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held to belong to it, to appear by counsel in cases where some one in a public capacity is subject to proceedings in which the Crown has an interest, and intervened on behalf of the archbishop. In the result the rule was discharged with costs. On that there followed the taxation of costs so far as the archbishop is concerned only, since by a well-established rule the Crown in such a case neither pays nor receives costs. The master proceeded to tax the costs, and allowed such of them as he thought had been properly incurred.

Objection was taken that no costs were recoverable by the archbishop, because the costs said to have been incurred by him were really incurred on behalf of the Crown, or else that the archbishop had appeared by a solicitor who was not entitled to act for him, namely, the solicitor of the Treasury. It is alleged for the prosecution that inasmuch as the Crown had appointed the Treasury Solicitor to look after the interests of the archbishop, and that solicitor could not lawfully act as solicitor for any one but the Crown, the archbishop was not represented by a solicitor and was not entitled to recover costs.

The question is, therefore, whether the solicitor of the Treasury was entitled to act as solicitor to the archbishop. Whatever is to prevent his so acting must rest upon some statute, and it is said that the obstacle is to be found in the Solicitors Act, 1843, s. 2, which bars any one from acting as solicitor for another without being duly qualified, and one of the qualifications is that he must be enrolled as a solicitor. If it were shewn that the solicitor of the Treasury is subject to that qualification, then the appellant would be right; but in the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, we have that which appears to me to be practically conclusive of this case. That section imposes penalties and disabilities in the case of unqualified persons who act as solicitors, but it enacts that, for the purpose of the section, a person is to be deemed to be duly qualified to act as an attorney or solicitor if he has a duly stamped certificate authorizing him to do so; the section, however, goes on to include, among those who are to be deemed to be duly qualified, persons who have been appointed to be solicitors to various public departments, and one of these persons is the solicitor of the Treasury. There has been, therefore, an appearance by a person who is a qualified solicitor, for that is what the statute enacts, and any objection must be on some ground other than that he was not qualified.

What other ground is there? The solicitor of the Treasury was appointed originally under 9 Geo. 4, c. 25. The 1st section contains this enactment: "Whenever any person has been, or is, or shall be appointed to be solicitor or attorney on behalf of His Majesty, under the orders and directions of the Commissioners of the Treasury, customs, excise, or stamps, or under the orders and directions of any Commissioners or other persons or person having the management of any other branch of His Majesty's revenue, for the time being, it is and shall and may be lawful for such person to act and practise as such solicitor or attorney under such orders and directions in all and every Court and Courts, jurisdiction and jurisdictions, place and places, in any and every part of the United Kingdom." Thus it is provided as to these persons, who otherwise might not be solicitors, that they are on behalf of His Majesty to exercise the rights of solicitors in all Courts. Then it is said that if the exercise of these rights in this case was on behalf of the Crown, it cannot be on behalf of any other litigant. It is on behalf of the Crown, because the Crown thinks that it is for the public advantage that it should intervene by appointing the solicitor of the Treasury to be solicitor for the archbishop; and I have shewn that he is as qualified to act in that capacity as any other solicitor. It is true that he takes the mandate from the Crown, which has appointed him solicitor of the Treasury for certain purposes; but one of the purposes is that in any given case, if it is in the interest of the Crown that he shall appear for a litigant, he shall do so, and the only way in which this can be done is by his appearing as solicitor on the record.

These considerations cover all that is necessary in this case. The solicitor of the Treasury is none the less a qualified solicitor because he has not got a certificate, and he is none the less solicitor for the subject because he is put on the record at the instance of the Crown.

It seems to me, therefore, that all the conditions are present which entitle the archbishop to a taxation of his costs, and to have the taxed costs paid by his opponent, and the appeal must be dismissed.

Romer L.J. I am of the same opinion. Putting aside for a moment the question as to the personal capacity of the solicitor of the Treasury, we find this—the archbishop is being proceeded against under circumstances which might make him personally liable for costs, and, if he succeeded, might entitle him to receive costs from the persons who were proceeding against him. Under those circumstances, the Crown, for what appear to me good and sufficient reasons, came to the conclusion that it was to the interest of the Crown that it should, at its own expense, defend on behalf of the archbishop.

I desire to point out that, in my opinion, when the Crown made the offer to the archbishop to conduct the defence, he was not bound to accept that offer. If he chose he could have defended at his own expense and declined the assistance of the Crown. But he did not do so: he accepted the Crown's offer, and he left it to the Crown to act for him. The result was that the Crown acted by its usual and proper solicitor; but still in this matter, and so far as I am now considering the case, I should point out that, so long as the Crown was acting in that proceeding on behalf of the archbishop, it would have been bound to have regard to the archbishop's interests, even if it turned out that they were not absolutely identical with, or were even in some respects opposed to, the interests of the Crown. Of course, if it had been found that the interests were so conflicting that it would not be proper to continue to act for the archbishop, the Crown might have retired from that position; but so long as it was acting for the archbishop, its solicitor was bound to regard the archbishop's interests. The archbishop did not cease to remain a party after the offer to conduct his defence. He remained a party just as before, liable to costs if he failed, able to receive costs if he succeeded, his solicitor, of course, being also the solicitor of the Treasury, acting by the authority of the Treasury. Under

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the circumstances which I have stated, which made the Treasury really liable for the expense of the defence, the solicitor would naturally look, not to the archbishop personally for costs if he failed, but to the Treasury. So it appears to me that, if the archbishop succeeded, the Treasury Solicitor would, as his solicitor, be, in the ordinary course, entitled to receive the costs payable by the other side, if those costs were awarded, and would then have to come down on the Treasury under the indemnity for the difference only between the costs received from the other side and the costs incurred on behalf of the archbishop.

The case cannot, to my mind, be substantially differentiated from that of an ordinary defendant who is in some such position as that of a master who is being sued by a servant where the master is insured against liability. There the insurance company defends on behalf of the defendant, and generally employs its own solicitor; but although that solicitor would primarily not look to the defendant personally for costs, yet, so far as the plaintiff in that action is concerned, that solicitor is, for all purposes, as between plaintiff and defendant, the solicitor for the defendant. In such a case, if the defendant is awarded costs, those costs would be recoverable by him, and, in estimating what the amount of those costs are, he would naturally and properly include among his costs those of the solicitor who acted for him in that case, although, as between him and the insurance company, the solicitor was the solicitor for the insurance company, and the insurance company had to see that the costs were provided by them if the defendant did not succeed.

It follows that in this case the appellant must fail unless it can be established that the solicitor of the Treasury had a personal incapacity for appearing for the archbishop under such circumstances as those I have indicated. Was he under such incapacity? In my opinion, certainly not. It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action or proceeding against him, should be undertaken, and the Treasury Solicitor is delegated by the Treasury authorities

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to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor. So that, when the Treasury Solicitor, in such a case as that, acting on the directions of the Treasury, appears and takes up the defence of an individual, it is part of his duty to act for that individual, and he is not the less acting for the individual, as between the individual and the person who is proceeding against him, because he is the Treasury Solicitor intervening on behalf of the Crown by the direction of the Treasury. In my opinion the statute of 9 Geo. 4, c. 25, has no such limited application, when properly regarded, as that contended for by the appellant. It seems to me clear here that the Treasury Solicitor, as part of his duty, was entitled to act as solicitor for the archbishop in the circumstances indicated, and in so doing he incurred no liability by reason that he had not taken out a certificate and was not duly qualified as an ordinary solicitor.

Under the statutes which have been brought to the notice of the Court, it is to my mind clear that the Treasury Solicitor was entitled to act for the archbishop, so as to be able to receive, as his solicitor, costs awarded to the archbishop.

I agree, therefore, that the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. In this case the appellant seeks to get rid of liability for the costs which were properly incurred in repelling the attack that had been made in the Court below upon the archbishop. The archbishop was the defendant on the record, and if the appellant had been successful would have been liable to pay costs. It was said that in the course of the proceedings it was ascertained that the Crown had intervened through the solicitor of the Treasury as representing the Crown. But it is clear to me that the solicitor of the Treasury intervened, not for the Crown, but as solicitor for the archbishop, to protect the archbishop in the course of the proceedings; and that being the state of things, if there were no further technical difficulties in the way, it would appear that the archbishop was entitled to an order that his costs as defendant should be taxed as against the prosecutor. But it is said this cannot be done because the solicitor who appeared for the archbishop was not a qualified solicitor. Having regard to the statutes to which my Lord has referred, and which I need not repeat, the Treasury Solicitor clearly occupied the position of a solicitor of the Court, although he did not possess the qualification ordinarily necessary for that position. Parliament makes him a solicitor for the purposes necessary for the discharge of his duties as solicitor of the Treasury, and in this case his instructions were to appear as solicitor for the archbishop.

In my opinion the taxation was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for prosecutor: *Wainwright & Co.*
Solicitor for defendant: *Solicitor of the Treasury.*

A. M.

[IN THE COURT OF APPEAL.]

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THE MEDITERRANEAN AND NEW YORK STEAMSHIP COMPANY, LIMITED *v.* A. F. & D. MACKAY.

Ship—Charterparty—Bills of Lading—Conclusive Evidence of Quantity delivered to Ship—Timber Cargo—Different Classes of Timber—Number and Measurement of each Class—Number and Measurement of Total Shipment—Short Delivery of one Class—Right to Reduction of Freight in respect of Shortage—Right to recover Value of Pieces Undelivered—Mode of estimating Value.

A cargo of timber of different kinds, consigned to the defendants, was shipped on board the plaintiffs' vessel under a charterparty, of which one clause was, "Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship." The bill of lading of the cargo gave the number of pieces of deals and battens and the number of superficial feet and the like particulars of scantlings, deal-ends, and boards respectively. The bill of lading also gave the total number of pieces and of superficial feet. There was a short delivery of deals, but an overdelivery, which was taken over by the consignees, of scantlings and boards, the total number of pieces of timber delivered being slightly in excess of the total number given in the bill of lading. In an action by the shipowners to recover freight, in which the consignees counter-claimed for the value of the deals not delivered:—

Held, that the bill of lading was conclusive as to the number of pieces and the number of superficial feet in each class of timber, and that the consignees were entitled to a deduction on freight in the proportion that the number of pieces of deal not delivered bore to the number specified in the bill of lading:

Held, also, that the defendants were entitled on their counter-claim to recover the value of the deals not delivered, to be ascertained by taking the proportion that the number undelivered bore to the number specified in the bill of lading.

Spaight v. *Farnworth*, (1880) 5 Q. B. D. 115, approved.

APPEAL from a judgment of Bucknill J. at the trial of the action with a jury.

The plaintiffs were owners of the steamship *Pocahontas*, and they brought the action against the defendants, who were consignees of the cargo, to recover the balance of freight alleged to be due for the carriage of goods on the steamer from St. Johns to Liverpool.

The charterparty in respect of this voyage related to the loading of a full cargo of timber of various descriptions and delivery thereof, "on being paid freight, as follows: For timber, per load of 50 feet, Customs calliper measure, deals, battens, &c., per Petersburg standard hundred of 1900, superficial feet, 2*l*. 12*s*. 6*d*.; deal-ends per ditto, 9 feet and under, 1*l*. 15*s*."; and freight was to be payable "on deals, battens, and other sawn lumber on the intake measure of quantity delivered as ascertained at port of discharge as follows, namely, one-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered, if any." The charterparty contained the following clause: "Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship. The captain's or agent's signature to be accepted in all cases as binding on owners."

The bill of lading upon which the questions in this case arose was, so far as is material, as follows: "Shipped in good order and well conditioned . . . .

"39,104 pieces deals and battens, containing 1,023,193 superficial feet.

"7113 pieces scantlings, containing 96,214 superficial feet.

"5653 pieces deal-ends, containing 61,316 superficial feet.

"27,527 pieces boards, containing 195,082 superficial feet.

"79,397 pieces of deals, battens, scantlings, ends, and boards containing 1,375,805 superficial feet, being marked and numbered in the margin, and are to be delivered in the like good order and condition at the port of discharge."

When the cargo was delivered there was a shortage in the number of deals of 1253 pieces, and also a shortage in the deal-ends of 806 pieces; but there was an overdelivery of scantlings and boards of 369 and 1703 pieces respectively. The defendants thereupon claimed a reduction of freight in respect of the non-delivery of the full amounts of deals and deal-ends specified in the bill of lading, and the value of the pieces not delivered. The plaintiffs refused to entertain this claim, and brought the action to recover the balance of freight due. They claimed freight on the basis of the numbers and measurements contained in the bill of lading. The defendants paid money into court in respect of a part of the plaintiffs' claim, and as to the residue pleaded that they were entitled to a reduction, in respect of the short deliveries, from the freight as estimated by the plaintiffs. They also counter-claimed the value of the pieces undelivered. The defendants had in fact taken delivery of the overplus of scantlings and boards, but not under circumstances, as appears by the judgment of the Court of Appeal, that shewed an agreement to treat the overdelivery as equivalent to a delivery of deals and deal-ends.

The jury found that there had been a shortage in delivery, and the learned judge decided in favour of the defendants on both the points raised by them.

The plaintiffs appealed.

Carver, K.C. (*J. D. Crawford* with him), for the plaintiffs. In the clause of the charterparty declaring that the bills of lading are to be conclusive evidence as to the quantity delivered, the expression "quantity" does not refer to measurement. It means either the total number of pieces or the number of each description, and the first of these alternatives is the natural interpretation. If there is an ambiguity, the clause must be construed against the person for whose benefit it was put in. There has, in fact, been no short delivery, for the total number of pieces shipped and delivered was practically the same as the number given in the bill of lading, there being in deed a slight excess over the latter number. The discrepancy between the allegations of the defendants and the quantities in the bill of lading really arises from the method of classification adopted by the defendants at Liverpool, although, as representatives of the consignors, they ought to be bound as to measurement by the figures given by their principals, which the shipowner cannot possibly check as he can the number of pieces.

The freight is payable on the amount of cargo taken on board according to the intake measurement: *Spaight* v. *Farnworth*. (1) That case, however, falls short of deciding this one, for there was an actual loss, and the only question was how to arrive at the freight that should be deducted under the circumstances. In the present case there has been no loss, and no deduction ought to be made from the freight ascertained by taking what was actually put on board. The freight payable on deals and that payable on scantlings is the same. The defendants are in this further difficulty in their claim to deduct freight—that there is no evidence as to the measurements of the pieces non-delivered, and therefore no means of ascertaining the freight which would have been attributable to them had they been delivered.

Pickford, K.C., and *Dennis O'Connor*, for the defendants. The clause in the charterparty as to the conclusive character of the quantities in the bills of lading should be read distributively as applying to each class of timber. The decision in *Spaight* v. *Farnworth* (1) supplies the rule as to freight in case of short delivery. In that case part of the cargo was lost in transit, and, as in this case, the actual measurements of the missing pieces were not known. Bowen J. ruled that the freight to be deducted was to be ascertained by the proportion that the pieces lost bore to the whole number, on the assumption that the pieces lost were of the average size of the bulk of the timber. The numbers and measurement in the different classes in the bill of lading being conclusive for all purposes, the plaintiffs cannot say that the overdelivered pieces of scantlings and boards are the missing pieces of deals. The freight on the two classes being the same does not affect this principle, for that is a mere accident. Further, the average measurements of the two classes are widely different, so that, although the totals of the number shipped and delivered are nearly the same, the measurement of the timber delivered is much less than the measurement given in the bill of lading.

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(1) 5 Q. B. D. 115.

Carver, *K.C.*, in reply. For the purposes of freight the deals and the scantlings are alike, and the only measurement to be considered is the intake measurement. It does not make any difference if some were called by wrong names. Even if they had all been called deals, the total measurement would still have to be looked at.

COLLINS M.R. In my opinion this appeal fails.

This is an action brought by shipowners against the consignees of a cargo of timber for freight payable by the terms of a bill of lading and a charterparty incorporated in it. It turned out that when the cargo was delivered there was a shortage in the most material portion of the cargo, namely, deals. There was also a shortage in that description of the cargo which is classed as deal-ends, but there was a surplus in other parts of the cargo, such as scantlings and boards.

When the delivery was made the consignees claimed a deduction in freight in respect of the short delivery, and also counter-claimed for the shortage, and assessed the deduction for freight on a calculation of the freight which would have been payable on the shortage, and their counter-claim on the value of the timber not delivered.

The question turns wholly upon the clause in the charterparty which regulates the scale at which the freight is to be payable for this timber cargo. These are the words: "Freight payable on deals, battens, and other sawn timber on the intake measure of quantity delivered as ascertained at port of discharge as follows, namely, one-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered, if any."

That in my judgment clearly makes the intake measure the standard by which the obligations of the person taking delivery of the cargo—that is, the cargo delivered at the port of discharge—are ascertained, and the freight payable on the cargo so delivered is determined. The scale applicable is the scale of the charterparty and the bill of lading; but all that to which it is to be applied is the cargo actually delivered at the port of discharge. On the other hand, it has been argued that the freight is payable on the amount of cargo actually taken on board, whether it was in point of fact delivered or not. There is a clause in the charterparty which makes bills of lading conclusive evidence against the owners as establishing the quantity delivered to the ship. In this case the consignees rely upon the bill of lading, which, in terms, states the quantity which is acknowledged to be shipped, specifying each of the particular classes, 39,104 deals and battens, and then smaller numbers of the other different species of timber of which the cargo was made up. Their point is that the bill of lading by the terms of the charterparty is conclusive as to the amount which was taken on board, and not merely conclusive as to the general measurement over all in superficial feet, set out in one of the particulars stated in the bill of lading, but conclusive also as to the respective quantities of each of the different classes of timber put on to the ship. The bill of lading sets out in detail the number of pieces and the measurement area of each particular class, as well as the number of pieces and the measurement of all the classes of cargo taken together. If it is to be construed, as it must be, as being conclusive evidence against the shipowners of the material facts stated in it, I cannot see why it is not conclusive as to the particular quantities of the particular descriptions and their measurement when put on board, as it is, by the admission of counsel for the plaintiffs, as to the total quantity taken altogether and the superficial measurement according to the scale laid down in the charterparty.

If that be so, on arrival at the port of discharge the shipowners were estopped from saying that they had not received (I take the most material item) 39,104 pieces of deals on board; and if they are estopped from denying that, they are met by the fact that there is a shortage of 1253 pieces. That shortage is the subject-matter of the counter-claim, and is not compensated for by the fact that there was a surplus of other and inferior classes of timber. It is admitted that if the defendants are entitled to rely upon the quantities mentioned in the bill of lading as conclusive, and the shortage of 1253 is, therefore, to be accepted, that leaves the defendants with a counter-claim on which they are entitled to succeed.

I am clearly of opinion that the bill of lading is, for the reasons I have given, conclusive as to the particular quantities of the different descriptions of cargo, just as much as it is conclusive as to the general measurement over all the whole cargo received on board. That view establishes, in accordance with the opinion of the learned judge, that the defendants' claim for shortage is good.

Now comes another question, as to how the freight payable by the defendants is to be calculated in view of the admitted shortage, and upon that the principle adopted by the consignees is that, the shipowners being precluded from denying that 39,104 pieces of deals were put on board, and there being a shortage of 1253 pieces, they are also precluded from denying that 39,104 pieces in the bill of lading measured over all 1,023,193 superficial feet; and taking those figures, they supply all the essentials for ascertaining what sum should be attributed per deal for freight. When that is ascertained, the deduction from the total freight in respect of the shortage is ascertained. For the plaintiffs it is said that mode of computation is incorrect, because, as a matter of fact, there was a delivery of a number of pieces of a miscellaneous description, which came in the aggregate to the same measurement over all as would have been the measurement if there had been delivery exactly in accordance with the bill of lading, and that, as it turns out as a matter of fact that deals were not put on board to the extent that the bill of lading purports to shew that they were, the freight must be measured with reference to the actual facts of what was put on board, and not by the conventional facts arising from the estoppel created by the bill of lading. As to that, it seems to me that when it is once established that the bill of lading is conclusive, not only as to the total superficial measurement of all the cargo of every description, but also as to the measurement of each particular description of cargo, that concludes the matter, and the question then is to ascertain what was the freight payable in respect of a certain portion of deals not delivered. That being the problem, it is to be determined by the proportion between the number of deals short delivered and the number of deals mentioned in the bill of lading as having been put on board, and so arriving at the proportion of freight attributable to the shortage. It seems to me that the plaintiffs are wrong on this point also, and I agree with the learned judge that the defendants were right both on the claim and the counter-claim. The appeal must, therefore, be dismissed.

ROMER L.J. I am of the same opinion. The counter-claim and the question of freight give rise to nearly the same question, and the answer depends upon the effect to be given to the bill of lading that was signed. As to this, it is said on behalf of the shipowners that the bill of lading only bound them to deliver the total number of deals, battens, scantlings, deal-ends, and boards there mentioned, of the total measurement in superficial feet there mentioned, or at any rate, putting aside the measurement, to deliver the total number of all descriptions enumerated, and did not bind them on delivery to distinguish between deals, battens, scantlings, deal-ends, and boards. Upon the determination of that point the counter-claim depends. To my mind it is clear that the bill of lading bound the shipowners as to the different descriptions of timber on board. From a commercial point of view, could it be said that a deal was the same to the consignee as a scantling or a deal-end? They are different in quality, different in value, and I may point out that the rate of freight is not the same in each case—that in respect of deal-ends being different from that in respect of the others. That being so, I will deal first with the counter-claim. When the delivery took place it was found that there was a shortage of 1253 pieces of deals. The purchasers claimed compensation in respect of that shortage; but it appears that there was an overdelivery in respect of scantlings and boards. With regard to that overdelivery, it is clear that, under the bill of lading, the defendants were not bound to take it; but they did take it, and I think that, under the circumstances, it must be taken that they took it under a sort of tacit agreement, to be inferred from the circumstances of the case, as scantlings and boards, and not as deals. I can find nothing in the circumstances of the case to shew that because they took the overdelivery of scantlings and boards they must be taken to have elected to treat the overdelivery as making up, so far as it covered it, the shortage of deals. That being so, the result would be that they would be entitled to compensation for the deficiency of the deals, and ought to give credit for the overdelivery in scantlings and boards. The amount awarded in the Court below is the difference between the loss by shortage of deals and the value of the overdelivery of scantlings and boards, and appears to be right in every respect.

As to the question of freight, that is also governed by the construction that should be put upon the bill of lading. The defendants say that they cannot ascertain the measurement to be attributed to the pieces of deal that were undelivered, and under these circumstances they ask the Court to adopt the principle laid down in *Spaight* v. *Farnworth* (1), and to take as the only way of arriving at the deficiency the proportion of the number of pieces of deal mentioned in the bill of lading, in connection with the total superficial area attributed to them in the bill of lading, to the number not delivered, and thus arrive at a result giving the superficial area attributable to the undelivered pieces, and having got that the freight attributable to the shortage is ascertainable. The answer of the shipowners is that there really never were 39,104 pieces of deals, but that that number stood for the deals that were delivered and 1253 pieces of wood that were included in the overdelivery of scantlings and boards. They say further that, as the rate of freight in respect of the scantlings and boards is the same as that in respect of the deals, no adjustment of freight is required. There seems to me to be a complete answer to that contention.

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(1) 5 Q. B. D. 115.

In the first place, the shipowners are not entitled to say, as against the indorsees of the bill of lading, that there were not 39,104 pieces of deals shipped; and therefore they are not entitled to say that the entry as to the number of deals included a number of scantlings and boards. Secondly, I think that the evidence which is before the Court does not prove in fact that the 1,023,193 superficial feet mentioned in the bill of lading as the measurement of the 39,104 pieces of deals was obtained from the superficial measurement of the deals that have been delivered and some overdelivered scantlings and boards. On both these grounds the contention of the shipowners fails, and consequently the appeal should be dismissed.

MATHEW L.J. The argument offered on behalf of the plaintiffs is that, if the number of superficial feet of timber mentioned in the bill of lading was delivered to the consignees or the indorsees of the bill of lading, the obligation of the shipowners was performed. When the documents in this case are looked at, it seems to me to be impossible to accept any such conclusion. The bill of lading is meant to be a negotiable instrument, and to entitle the indorsees or consignees to delivery of the goods specified in it upon the terms contained in it. The terms of the charterparty provide for the way in which the freight is to be payable thus—freight payable on deals, battens, and other sawn timber on the intake measure of quantity delivered. The contention for the plaintiffs is that the clause means the total quantity delivered. But the obvious interpretation, as it appears to me, is that the clause refers to the quantity of each description as ascertained at the port of discharge. How is the quantity of each description to be arrived at? The bill of lading provides for this. There is set out in it the number of pieces of deals and battens containing a certain number of superficial feet. Scantlings, deal-ends, and boards are dealt with in the same way. It is provided by the charterparty that the bill of lading is to be conclusive—conclusive, in my opinion, as to the quantity of each description to be delivered as well as of the total number of superficial feet. That being so, it seems to me that the questions in the case are easily solved. As to the shortage, the consignees are entitled to say that by the bill of lading the shipowners were bound to deliver to them so many deals of such and such superficial measurement, but have not done so, and in consequence that they have a claim for shortage and for an allowance in respect, first, of the freight attributable to the portion not delivered; and, second, of the value of the quantity which was not delivered. Unless the bill of lading can be treated as not being binding and conclusive between the parties, it seems to me that there is no answer to the case of the consignees.

It is said that though there may be no difficulty in arriving at the amount to which the defendants are entitled on the counter-claim, it is obligatory, when the question of freight is dealt with, to ascertain with precision how the freight is to be arrived at which is attributable to that portion of the cargo which has not been delivered. It is said that there must be some evidence as to the actual dimensions of the cargo when shipped, in defiance, as it seems to me, of the terms of the charterparty, which makes the bill of lading conclusive between the parties. I have nothing to add to that which has been already said as to the mode of calculation that ought to be adopted. It seems to me that the defendants were right, and that any other but their interpretation of these documents would lead to much confusion. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Miller & Son, Liverpool.*

Solicitors for defendants: *Trinder, Capron & Co.*

A. M.

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1903
Jan. 21, 22, 23, 27.

[IN THE COURT OF APPEAL.]

HOWDEN *v.* YORKSHIRE MINERS' ASSOCIATION.

Trade Union—Application of Funds contrary to Rules—Action for Injunction by Individual Member of Union—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3.

Where a trade union, formed for the purpose (among others) of providing benefits for members, and registered under the Trade Union Act, 1871, were proposing to apply funds of the union to purposes not sanctioned by its rules, and in contravention of essential provisions of those rules, which defined the nature and objects of the union, and the trustees of the union were acquiescing in the application of the funds as aforesaid :—

Held, that an action was maintainable by an individual member of the union for an injunction to restrain such a misapplication of the funds, inasmuch as it was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, sub-s. 3.

By one of the rules of a trade union provision was made for the weekly allowance of strike pay to members, who were "permitted to cease work by the sanction of the association in accordance with the rules." A cessation of work by members of the union having taken place without the sanction of the association, its sanction was afterwards obtained for the continuance of that cessation as from a date subsequent to its original commencement :—

Held (by Vaughan Williams L.J., Stirling L.J. and Mathew L.J., Stirling L.J. doubting), that the rule did not authorize the union to allow weekly strike pay to the strikers subsequently to the sanction of the association being obtained as aforesaid.

By one of the rules of a trade union provision was made for the allowance of weekly strike pay in cases where members were "thrown out of employment" in consequence of any action legally taken by the union. Members of the union, who had been employed at a colliery, and who had struck of their own accord, and not in consequence of any action taken by the union, failed in an attempt made by them some time afterwards to obtain re-employment at the colliery, which failure was alleged to have been in consequence of action taken by the union :—

Held, that the rule could not be applied to their case, because they could not be said to have been "thrown out of employment" within its meaning.

APPLICATION by the defendants for judgment or a new trial in an action tried before Grantham J. with a jury.

The action was brought by the plaintiff, as a member of the defendant association, against the defendants, and their general treasurer and branch treasurers, for an injunction to restrain the defendants, their officials, agents, and servants, from misapplying the funds of the association, or dealing with them in a manner contrary to the rules of the association, and the provisions contained therein.

During the argument in the Court of Appeal the Court called attention to the fact that the trustees of the association, in whose hands their funds were, had not been made parties to the action, and directed that they should be added as defendants on certain terms which it is not material to set out.

The question raised in the case was whether payment of strike pay proposed to be made by the association to certain of its members, who were out on strike, would be a misapplication of the funds of the association. The history of the case, as appearing from the evidence at the trial, was very voluminous, and gave rise to somewhat lengthy arguments as to questions of fact; but the following summary of the facts will, it is thought, be sufficient for the purposes of the points of law in respect of which the case is reported.

The defendant association was a trade union of miners registered under the Trade Union Acts, 1871 and 1876. The plaintiff, who was a member of the union, was a miner employed at the Denaby Colliery, which belonged to the Denaby and Cadeby Collieries Company. There were several branches of the union, among which were the Denaby Colliery and Cadeby Colliery branches, consisting of men employed at the Denaby and Cadeby collieries. Certain rules had been passed by the defendant association, and registered under the Trade Union Acts. The provisions of these rules, so far as material, were as follows. By rule 1 it was provided that the rules should be for the government of the association and the protection of the members; and that no new rule should be made, nor should any of the rules therein contained, or thereafter to be made, be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting, called specially for that purpose in accordance with the rules. By rule 3 it was stated that the association was established for the objects (among others) of raising funds for mutual help, of procuring improved enactments for the efficient management of mines, whereby the health and lives of miners might be protected, of securing the wages bargained for by the members, and protecting members when unjustly dealt with by their employers or their managers, of securing compensation for accidents caused by the negligence of employers or their managers, of shortening the hours of labour, of providing a weekly allowance for the support of members and the families of members, when locked out or on strike, and resisting unjust regulations in connection with their employment, and of making certain allowances to members and their wives on death; and it was provided that the whole of the moneys received by the association should be applied to carrying out the foregoing objects according to the rules, and that any officer misapplying the funds should repay the amounts so misapplied. Rule 4 provided for the government of the association by a council, consisting of certain officers and a delegate from each of the branches comprising the association. By rule 22 there was to be a general treasurer, nominated by a branch, and elected by a majority of members throughout the association, whose duty it should be to receive and pay moneys belonging to the association, and who under no circumstances was to pay, lend, or appropriate the funds of the association to any purpose whatever, except the same were in accordance with the rules, resolutions, and minutes of the association, and sanctioned by the council. Rule 64 provided as follows: "If any branch, member, or members have grievances affecting their wages, mode or manner of working, or the hours of labour, and the employers refuse to remedy those grievances, and after all proper and peaceful means have been tried to effect a settlement by deputations from members, with the advice and assistance of the council, such member or members be permitted to cease work by the sanction of the association in accordance with the rules, such members shall receive" [certain weekly amounts were then specified by way of strike pay] "until such time as they can resume work either at the place they left, or at some other colliery, or the council, with the sanction of the majority of members, decide otherwise." By rule 65 it was provided that "any branch, or portion of any branch, which may be locked out, or otherwise thrown out of employment, in consequence of any action that may legally have been taken by the association to keep up the price, or remedy any grievances either at that or any other colliery connected with the association, the members of such branch shall be supported after the same rate as the members on strike, until such time as they can get work, or the association decide otherwise." By rule 72 it was provided that "no branch, or portion of a branch, shall be allowed to strike, or leave off work with a view of causing the works to stand, unless sanctioned by two-thirds of the members comprising the branch, when such strike shall be determined by registered ballot" in a manner described by the rule.

By the colliery rules set out in the colliery book signed by the miners the contract of service of the miner was determinable by fourteen days' notice on either side.

It appeared that there had been for a considerable time prior to June, 1902, a dispute between the colliers employed by the Denaby and Cadeby Collieries Company and their employers as to what was called "bag dirt," a substance which lay beneath the coal, and had to be got out before the coal could be got. The employers considered that the getting of the bag dirt was included in the prices fixed by their contracts with the miners for getting coal, but the miners claimed to be paid extra for it. Deputations of the miners had, prior to June, 1902, waited upon Mr. Chambers, the managing director of the collieries, with a view to the revision of the price-list in relation to the bag dirt question, but he had refused to make any alteration in reference thereto. These attempts to settle the dispute were made by the advice and with the assistance of the council of the defendant association. On June 28, 1902, certain deductions in respect of bag dirt were made by the employers from the weekly wages claimed by some of the men. In consequence of these deductions, on June 29, a meeting of the miners took place, at which a resolution was passed that they should stop work until the bag dirt dispute was settled, and accordingly on June 30 a majority of the men did not go to work at the collieries, but a minority, of whom the plaintiff was one, continued to work. The step so taken by the men had not received the sanction of the defendant association, and no notices to determine their contracts of service had been given by the men before striking. On hearing of the strike the executive committee of the defendant association caused the Denaby and Cadeby branches to be informed that the strike was illegal and contrary to the rules of the association. On July 2 a deputation of the men waited on Mr. Chambers with a view to a settlement of the question, but no settlement was effected. On July 7 a resolution was passed by a meeting of the men on strike in favour of an application to the association for strike pay, and that the pits should remain closed until a fresh price-list was made out. On July 11 letters were written by the secretaries of the Denaby and Cadeby branches of the union to Mr. Pickard, the secretary of the defendant association, asking for strike pay, but the application for strike pay was not then granted. On July 14, at a meeting of the council of the association, it was in substance resolved that the men should be told to resume work, and to take a ballot whether they would give notices to terminate their contract of service, in order to get their grievances settled; and on the same day Mr. Pickard, in pursuance of instructions from the council, telegraphed to Mr. Chambers, asking him to receive a deputation for the purpose of arranging for the men to resume work. On the next day Mr. Chambers telegraphed in reply that there was no need of a meeting: the pits were open when the men wished to resume work. On July 14 summonses were taken out against the men who had struck, under s. 4 of the Employers and Workmen Act, 1875, for absenting themselves without leave from their employers' service on days between that date and June 30; upon the hearing of which summonses orders for payment of certain amounts by the men were made by the Court of summary jurisdiction.

On July 15 at a meeting of the men it was resolved that they should go back to work, and that a ballot should be taken as to whether fourteen days' notice to terminate their contract of service should be given. On July 16 a ballot was taken among the men on the question whether they were in favour of giving fourteen days' notice, until such time as their grievances were remedied, and a majority voted in the affirmative. On July 17 the men went to the pits, and offered to resume work; but the employers, before they would allow them to do so, required them to sign the colliery book again. The men however refused to do so. In so refusing they acted by the advice of the council of the defendant association. It appeared that, since the men had signed in the first instance, certain special rules had been made, and approved by the Secretary of State, under the Coal Mines Regulation Act, 1887, known as the timbering-in rules, which the union alleged to be illegal, as not being in accordance with the provisions of the Act; and it was feared by the union that, if the men signed the book, they would be binding themselves by a fresh contract to observe those rules. The men then served notices on the employers to determine their contracts of service at the expiration of fourteen days. Subsequently on the same day Mr. Pickard requested Mr. Chambers to receive a deputation from the men, but he refused to do so, or to allow the men to resume work until they signed the new contract. After that date there were several applications to Mr. Chambers to receive deputations for the purpose of settling the dispute, which were unsuccessful. On July 24 a resolution was passed by the defendant association for the allowance of strike pay to the men who had struck as from July 17. During the fourteen days from July 17, the men continued to present themselves at the pits for the purpose of resuming work at each shift, but were not allowed to do so.

The learned judge left to the jury the questions (1.) whether the men had broken their contract of service on or prior to July 17; (2.) whether the contract of service between the colliery proprietors and the men had been rescinded, and put an end to, by the conduct of the men on or prior to July 17; and (3.) whether the men had an opportunity offered them to return to work on the old terms on or prior to July 17, and, if so, whether they refused to return to work on those terms. The jury answered all the questions in the affirmative, and the learned judge thereupon gave judgment for the plaintiff.

Rufus Isaacs, K.C., and *Danckwerts, K.C.* (*Loehnis* with them), for the defendants. Assuming in the plaintiff's favour that the giving of strike pay would in the present case be contrary to the rules of the defendant association, this action is, nevertheless, not maintainable. Prior to the passing of the Trade Union Act, 1871, the objects of a society of this kind being in restraint of trade, the society had no legal status: and, consequently, a member or members of it could have no legal remedy by way of action for misapplication of the funds, or infringement of the terms of the agreement between himself or themselves and the other members of the society. This state of the law was modified in favour of trade unions to a certain extent by the Trade Union Act, 1871, but, except to that extent, the law remains the same. By ss. 2 and 3 of the Act, the purposes of a trade union are no longer, by reason merely that they are in restraint of trade, to be deemed unlawful, so as to render members of a trade union liable to criminal prosecution, or to render void or voidable any agreement or trust; but by s. 4 "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely," among others, "any agreement for the application of the funds of a trade union, (*a*) to provide benefits to members; or (*b*) to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union." Therefore the Legislature, in legalizing the position of trade unions, refrains from giving them the status of corporations, and expressly excludes certain consequences which would otherwise follow from their legalization. The authorities shew that the effect of s. 4 is to prevent the maintenance of such an action as this, as being an action brought with the object of directly enforcing an agreement which comes within the meaning of sub-s. 3 of the section. In *Rigby* v. *Connol* (1) the action was for an injunction to restrain a trade union from excluding a member, whom they had expelled, from participating in the benefits of the union, and it was held by Jessel M.R. that the foundation of the jurisdiction of the Court to grant injunctions in such cases was the right to property vested in a member of the society, and that therefore the action was brought directly to enforce an agreement by the society to provide benefits to members within the meaning of s. 4 of the Act of 1871. In *Chamberlain's Wharf, Limited* v. *Smith* (2) the Court of Appeal followed the decision in *Rigby* v. *Connol.* (1) In *Duke* v. *Littleboy* (3), which was substantially similar to the present case, Denman J. held that such an action as this could not be maintained as being brought with the object of directly enforcing an agreement within s. 4, sub-s. 3, of the Trade Union Act, 1871. The rules embody the terms of the agreement between the plaintiff and the other members of the society, but for which the plaintiff could not maintain the claim for an injunction, and it is impossible to give him a right of action without enforcing that agreement. His claim is that the defendants should be compelled to retain the funds, in order that they may be applied to the purposes sanctioned by the rules, i.e. (inter alia) the provision of benefits for himself as a member of the society. In a case like the present the only mode of directly enforcing the agreement embodied in the rules is by action for an injunction to restrain the society from applying the funds otherwise than according to the rules; for the plaintiff has no right in præsenti to any benefit under them. The decision in *Chamberlain's Wharf, Limited* v. *Smith* (2) is binding on this Court, and it is difficult to see how an action to restrain a trade union from excluding a member from participating in its benefits under the rules can for the present purpose be substantially distinguished from an action to restrain a trade union from applying its funds contrary to the agreement for their application to benefits embodied in its

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(1) (1880) 14 Ch. D. 482.

(2) [1900] 2 Ch. 605.

(3) (1880) 28 W. R. 977.

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rules. The decision of Fry J. in *Wolfe* v. *Matthews* (1) is no doubt to a certain extent an authority against the defendants; but it is to be observed that the point seems to have been taken in that case by way of preliminary objection to the jurisdiction, and the learned judge, in overruling that objection, said that it remained to be seen whether the terms of the Act would eventually permit any relief to be given to the plaintiff. If the case is to be taken as a final decision of the point by the learned judge, it is submitted that that decision must be taken to have been in effect overruled by the Court of Appeal in *Chamberlain's Wharf, Limited* v. *Smith.* (2) The reference to *Wolfe* v. *Matthews* (1) by Lindley L.J. in *Swaine* v. *Wilson* (3) does not involve the expression of any opinion as to whether the former case is reconcilable with *Rigby* v. *Connol.* (4) In any case this action cannot be maintained by the plaintiff as an individual member of the association. The only remedies given by the Trade Union Act, 1871, for the protection of the property and rights of a trade union, and for the enforcement of the application of their funds to the purposes of the rules, are those given by ss. 9–12 of the Trade Union Act, 1871. Under those sections only the trustees of the association can sue in respect of its property. Before the Act of 1871 trade unions, being illegal, had no such remedies, and the only effect which the Act can have in this respect is to give the remedies which it expressly provides: *Barraclough* v. *Brown.* (5)

Secondly, for the purposes of the point arising on the Trade Union Act, 1871, the case has been treated as if the application of the funds, which it is sought to restrain, were ultra vires in the sense of being entirely outside the scope of the association and the rules; but that is not really so, for it is one of the objects of the association to give strike pay to members of the association out on strike, subject to certain conditions. It is clear that a Court of Equity would not grant an injunction of this kind, where the proposed payment was not ultra vires in the sense of being entirely outside the objects of the association, but merely in the sense that there had been some irregularity in a matter connected with the internal management of the association, which could be waived by a resolution of the members or otherwise set right quoad the future. It is submitted that the present case comes within that category, for the association could alter the rules so as to permit the strike pay to be given. It was held in *MacDougall* v. *Gardiner* (1) that the Court ought not to interfere at the instance of a shareholder of a company in respect of a thing connected with the internal management of the company which there was power to do, if done regularly, on the ground that it had been done irregularly. It is admitted that the strike was in its inception illegal, because the men struck without giving the fourteen days' notice required by the contract between them and their employers, and also that the conditions mentioned in rule 64 had not been complied with, because the sanction of the association had not been obtained before striking; but any irregularity has now been cured: and with regard to the cessation of work subsequent to July 17, there has been compliance in the strictest sense with all the conditions necessary to bring the case within rule 64. It is not necessary in order that that rule may apply that the contract of employment should have remained in existence on that date. The men might cease work within the meaning of the rule though there was no such contract; but, if that is not so, it is submitted that the contract did still remain in existence. The action of the men in ceasing work in the first instance without giving notice was no doubt a breach of their contract, and might perhaps have been treated as what is called in the cases on the subject a repudiation of the contract, which entitled the employers to elect thereupon at once to rescind the contract. But the employers did not so elect. On the contrary, upon negotiations taking place, their representative gave notice that the pits were open to the men when they chose to resume work. The employers having thus made their election not to rescind the contract could not afterwards elect to rescind it. Consequently the contract of service remained undetermined. The men presented themselves

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(1) (1882) 21 Ch. D. 194.

(2) [1900] 2 Ch. 605.

(3) (1889) 24 Q. B. D. 252, at p. 259.

(4) 14 Ch. D. 482.

(5) [1897] A. C. 615.

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(1) (1875) 1 Ch. D. 13.

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at the colliery on July 17 for the purpose of resuming work, and gave the requisite fourteen days' notice to determine their contract in the regular way. The sanction of the association had then been obtained, and all other steps necessary under the rule as preliminary to the cessation of work had been taken. It is contended, therefore, that the application of the funds which it is sought to restrain is authorized by rule 64. At any rate there was evidence for a jury that the employers had elected not to accept the repudiation of their contracts by the men, and to treat the contracts as still subsisting. The summonses, which the employers took out against the men for absenting themselves from their employers' service, shewed that they considered the employment to be still subsisting. If so, there was a question which ought to have been left to the jury as to whether the employers had acted in such a manner as to keep the contracts alive until July 17, or, in other words, whether they accepted the repudiation of their contracts by the men; and the failure to direct the attention of the jury to that question was a misdirection.

Thirdly, on the assumption that rule 64 was not applicable, it is contended that upon the facts rule 65 applies to the case; for the men were either locked out or "otherwise thrown out of" employment by reason of following advice given to them by the association. It is not necessary, in order to satisfy those words, that there should be at the time a subsisting contract of employment. It is submitted that "thrown out of employment" merely means "unable to obtain employment in the avocation which a man regularly follows"; but if that meaning is too wide, the words are satisfied in a case where, men having been employed, in the way of their regular avocation, and the employment having been lately determined, the men are desirous of being re-employed by the same employers, but, by the advice of the council, insist on something which the employers refuse to agree to, and consequently the men fail to get employment. Here the men would have been allowed to resume work, but for their refusing on the advice of the council to sign on again.

[Mathew L.J. May it not be answered that the men really lost their employment by their own original act in striking, and that they only wished to resume work for the purpose of putting themselves in a position to claim strike pay?]

It is submitted that it is immaterial with what intention they offered to resume work. The grievance which constituted their reason for originally striking might possibly have been removed within the fortnight, and then they would have continued working. In that point of view there would be a question of fact for a jury as to the cause of the men being out of work. It is obvious that it cannot be essential, in order to satisfy the terms of rule 65, that there should be a subsisting contract of employment, for in the case of a lock-out it must be presumed that the employers would not lock the men out in breach of a subsisting contract, or until the expiration of the requisite period of notice. Consequently, at the date of a lock-out, there would be no subsisting contract of employment. It was presumably the intention that rules 64 and 65 should cover all cases in which miners, who were members, were out of employment in consequence of advice given by the association. Rule 64 applies to the case of a strike by the men; and it must have been intended by rule 65, after mentioning the obvious case of a lock-out by the employers, to provide for all other cases which might arise. "Employment" in rule 65 may be construed to mean employment in the work which a man is in the habit of doing at the place where he has been in the habit of doing it. The "employment" in that sense is not determined by reason of the fact that there is no subsisting contract of employment with the employers.

Montague Lush, K.C., and *H. T. Waddy* (*H. W. W. Wilberforce* with them), for the plaintiff. This action is not one the object of which is directly to enforce an agreement for the application of the funds of the union to the provision of benefits for members within the meaning of the Trade Union Act, 1871, s. 4. The effect of granting the injunction to restrain misapplication of the union funds is not in any way to establish the title of the plaintiff to any benefit out of those funds. If the present action is an action for the direct enforcement of an agreement, it is somewhat difficult to see what would be an indirect enforcement of it, or what effect can be given to the word "directly" in the section. The case of *Wolfe* v. *Matthews* (1) is directly in point, and is easily distinguishable from *Rigby* v. *Connol* (2) and *Chamberlain's Wharf, Limited* v. *Smith.* (3) In those cases the effect of granting the injunction would have been to establish the title of the plaintiffs to participate in the benefits of the association. [They also cited on this point *M'Laren* v. *Miller.* (4)]

The question involved is not one merely of internal management of the association, or of a mere irregularity which could be set right. The Trade Union Act, 1871, by s. 14 and Sched. I., requires in the case of a registered trade union the registration of rules defining the objects and nature of the society, and, as long as those rules stand, they form, as it were, the charter of the association, and are analogous to the memorandum of association in the case of a company: *Reg.* v. *Registrar of Friendly Societies.* (5) It is true that the defendants have power to alter the rules, but any such alterations must be registered under the Act, and it cannot be assumed that such an alteration will take place. As long as the present rules exist, and until any alteration of them is duly made, it would not be competent for the association by anything they could do to authorize any application of the funds contrary to the rules. [They cited on this point *Auld* v. *Glasgow Working Men's Building Society.* (6)]

Under such circumstances as exist in the present case, an action will lie by an individual member of the association to restrain misapplication of the funds. It is obvious that in such a case the trustees will not sue, for they have been applying the funds in the manner complained of in accordance with the directions of the association; and, if, as contended, the trustees are the only persons who can sue under the Act, there is really in such a case no remedy for a breach of trust by the trustees themselves. The case therefore falls within the principle of the cases in which the Court of Chancery has allowed an individual shareholder of a company to sue to prevent misapplication of the funds of the company. [They cited on this point *Warburton* v. *Huddersfield Industrial Society*. (1)]

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(1) 21 Ch. D. 194.
(2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) (1880) 7 R. 867.
(5) (1872) L. R. 7 Q. B. 741.
(6) (1887) 12 App. Cas. 197.

With regard to the construction of rule 64, that rule only authorizes the granting of strike pay where the men have been permitted to cease work by the sanction of the association. Here admittedly the men ceased work without that sanction, and they never in fact resumed work. Assuming the question whether the contracts of service continued in existence on July 17 to be material, it is submitted that, on the undisputed facts of the case, as a matter of law, they did not so continue. If that be so, the only questions in the case are questions of law, and there was no question of fact for the jury, in which case any suggested misdirection would be immaterial. There was no evidence on which a jury could reasonably find that the contracts of service did continue in existence on July 17. When one party to a contract repudiates the contract, and the other party elects not to rescind the contract on that repudiation, no doubt the contract remains in existence for the benefit of both parties; but, on such a repudiation by one party, the other party is not bound to elect immediately whether he will rescind. Here the employers did nothing whatever to shew that they were treating the contracts of service as subsisting before July 17. On the contrary, the only possible inference from the facts is that both parties considered those contracts as at an end. The fact that the employers required the men to sign fresh contracts before resuming work on July 17 shews conclusively that they treated the old contracts as at an end upon that date; and the men never meant to go back on the old footing; they only went back to put the strike in order. The taking out of the summonses under the Employers and Workmen Act could not operate as an election by the employers to treat the contracts as subsisting. The proceedings under that Act are merely by way of recovering damages from the men for breach of contract by summary process; and, in the case of repudiation of a contract by one party, an action by the other party for damages does not shew that he treats the contract as

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(1) [1892] 1 Q. B. 817.

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subsisting for any other purpose than the recovery of damages: *Frost* v. *Knight*. (1)

With regard to rule 65, it is clear that this was not the case of a lock-out, and the men cannot be said on July 17 to have been "thrown out of employment" in consequence of any action taken by the association: for they had already put an end to their employment of their own accord on June 30. It is submitted that the rule must contemplate an employment the continuity of which is broken in the first instance through some action of the association. Here all that can be said is that the men failed to obtain re-employment by reason of following advice given to them by the association. If the words "thrown out of employment" are to be construed as suggested by the defendants, then they must include any members unable to obtain work at a colliery in consequence of the action of the association, whether they had ever been at work at the colliery before or not, which cannot have been the intention of the rule.

R. Vaughan Williams, for the trustees of the association, stated that they had taken the view that they were bound to apply any funds in their hands in accordance with the directions of the council of the association, but with regard to the future they would of course be bound by any order the Court thought fit to make.

Danckwerts, K.C., in reply.

VAUGHAN WILLIAMS L.J. This action is brought by the plaintiff, a member of the Yorkshire Miners' Association, a trade union registered under the Trade Union Act, 1871, against the association and its general and branch treasurers. There were no pleadings, but the indorsement on the writ states that the plaintiff claims, as a member of the association, an injunction to restrain the defendants, their officers, agents, and servants, from misapplying the funds of the association and dealing with them in a manner contrary to the rules of the said association and the provisions contained therein. The case really raises two questions, of which the first is a pure question of law, and the other is a question which depends partly on the true construction of certain of the defendant society's rules and partly on the inferences of fact to be drawn from certain documents and undisputed facts. This latter question is whether the application of the funds which the defendants are proposing to make is a misapplication of them, which ought to be restrained by injunction.

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(1) (1872) L. R. 7 Ex. 111.

The argument for the defendants on the first question, which, as I have said, is one of law, is put in two ways. First, it is said that the right to bring such an action as this must depend upon the provisions of the Trade Union Act, 1871, and that, when that Act is looked at, it will be seen that a member of a trade union is not only not entitled thereby to bring such an action, but is actually prohibited from doing so. That contention is based mainly on the 3rd sub-section of s. 4 of the Act. It is further contended that, if the argument based on the words of that section cannot be maintained, and such an action is not thereby prohibited, the plaintiff is not the right person to bring the action. It is said that possibly some action of the kind might be brought by the trustees of the trade union, whose position is defined by s. 9 of the Act; but that this action is not brought by them, but by the plaintiff, without any reference on the face of the writ to its being brought by him on behalf of any other members of the association besides himself. These, I think, are shortly the main questions raised by this case. In the course of the argument it was pointed out by the Court that, according to the usual practice in such cases, the trustees, as being the persons in whose hands are the funds the misapplication of which it is sought to restrain, ought to be brought before the Court in order that the action may be properly constituted. The Court therefore thought it right to direct that they should at this stage be added as defendants on certain terms, in order that any injunction which might be granted with regard to the future application of the funds should be binding upon them.

Having made these observations, I will proceed to deal with the question of law arising on the construction of the Trade Union Act, 1871. The defendants deny that the proposed

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application of the funds would be a misapplication of them; but they contend that, assuming the contrary to be the case, an action of this kind is prohibited by s. 4, sub-s. 3, of the Trade Union Act, 1871. It will be remembered that, prior to the passing of that Act, combinations of workmen, like the defendant association, were illegal in such a sense that their members could not bring actions to enforce their rights inter se, nor could they successfully prosecute their officials for the misappropriation of their funds. Then came the Act, which by ss. 2 and 3 provides that the purposes of a trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of the union liable to criminal prosecution, or so as to render void or voidable any agreement or trust. If those provisions stood alone, then, subject to any practical difficulties which might arise from the fact of a trade union not being a corporate body, the result would be that there would be nothing to prevent a trade union from suing or being sued for the purpose of enforcing an agreement which was in its nature in restraint of trade—that is to say, not only would such trade unions be relieved from any liability to criminal prosecution and any disability under which they had previously laboured with regard to the protection of their property, but they would be in a position to enforce an agreement in restraint of trade, which no other person in the realm can do. The Legislature appears to have thought that, the agreements made between the members of trade unions being ordinarily in restraint of trade, some limitation ought to be imposed upon their power to bring actions in respect of such agreements, after the removal of their prior disabilities as provided for by ss. 2 and 3 of the Act; and therefore s. 4 was passed for that purpose. That section, so far as material, runs as follows: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . . 3. Any agreement for the application of the funds of a trade union (a) to provide benefits to members." It is not disputed that the rules of the defendant association registered in accordance with s. 14 and the 1st schedule of the Act constitute an agreement of the kind contemplated by sub-s. 3; but it is contended on behalf of the plaintiff that this action is not a proceeding instituted with the object of directly enforcing that agreement, inasmuch as the result of the action, if successful, will not be that the plaintiff will recover anything, or obtain any declaration of his right to any benefit. In support of that contention the decision of Fry J. in the case of *Wolfe* v. *Matthews* (1) was cited. In that case the plaintiffs sued, on behalf of themselves and other members of a trade union, to restrain the defendants from applying any part of the funds of the society in carrying out an amalgamation with another society, contrary to the rules which directed the application of such funds to the provision of benefits to members. The preliminary objection was taken that the action was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. Fry J. held that to grant an injunction to restrain the misapplication of the funds of the union was not directly to enforce such an agreement. He said that an order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of funds, but that all that was sought was to prevent the payment of the moneys to somebody else; and that, either that was no enforcement of an agreement at all, or it was an indirect enforcement. He went on to say that it was only by a stretch of language that such an order could be said to enforce an agreement, and that the utmost that could be said was that it made it more likely that the plaintiffs would obtain payment of the benefits to which they might be entitled. On those grounds he was of opinion that the judgment of Jessel M.R in *Rigby* v. *Connol* (2) did not apply. In answer to the plaintiff's contention the defendants contend that the decision of Fry J. in *Wolfe* v. *Matthews* (1) was wrong; that the decision of Jessel M.R. in *Rigby* v. *Connol* (2) governs the present case, and that that decision was affirmed by the judgment of the Court of Appeal in

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(1) 21 Ch. D. 194.

(2) 14 Ch. D. 482.

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Chamberlain's Wharf, Limited v. *Smith.* (1) It is therefore necessary to consider those cases. In *Rigby* v. *Connol* (2) the plaintiff, who had been expelled from a trade union, brought an action against the committee and trustees of the union, claiming to be entitled to participate in the benefits of the union, and asking that the defendants should be restrained from excluding him therefrom. That appears to me to be a very different kind of action from that which was brought in *Wolfe* v. *Matthews* (3), because the plaintiff was claiming a share in the benefits of the union, and asking for an injunction to enable him to get that share. Jessel M.R., after saying that the statement of claim shewed no cause of action, inasmuch as it did not state that there was any property belonging to the union, or that the plaintiff was entitled to any share in such property, went on to dismiss the action on the ground that it came within the prohibition of s. 4 of the Trade Union Act, 1871. After stating that the object of the Act was primarily to prevent the officers of trade societies from robbing them, and to enable them to sue in respect of their property, and to hold property, he went on to say that it was not intended that the contracts entered into by the members of the society should be made legal contracts inter se, so that Courts of justice should interfere to enforce them; and that, the agreement contained in the rules of the union being an agreement to provide benefits for members, if he were to decide in favour of the plaintiff, he would be directly enforcing that agreement, because he would be declaring that the plaintiff was entitled to participate in the property of the union, and in substance enforcing specific performance of the agreement. I agree with Fry J. in thinking that the judgment of Jessel M.R. in *Rigby* v. *Connol* (2) did not involve the result that to decide in favour of the plaintiffs in *Wolfe* v. *Matthews* (3) was directly to enforce an agreement for the provision of benefits to the members of a trade union. Then comes the case of *Chamberlain's Wharf, Limited* v. *Smith.* (1) That also was an action by plaintiffs, who were members of a trade association, to restrain the committee from acting on a resolution expelling the plaintiffs from the association. The pleadings are not set out in the report, and it is not stated in the statement of the facts that the plaintiffs were claiming to participate in the funds of the association; but the defendants' counsel in reply stated that the plaintiffs were asking the Court to declare them entitled to the benefit of the rules, and to enforce the application of the property of the association in accordance with the rules; and Lord Alverstone M.R. in giving judgment said, as appears from p. 612 of the report, that the plaintiffs claimed the aid of the Court in order to maintain their position as being entitled to rights in the character of members of the association. That being so, he held that, looking at the substance of the matter, the action was instituted with the object of directly enforcing the agreement embodied in the rules of the association, which was an agreement which came within the terms of sub-s. 1 of the 4th section of the Trade Union Act, 1871. Collins L.J., in agreeing with Lord Alverstone M.R., said that in his opinion the case came in terms within the decision in *Rigby* v. *Connol.* (1) He pointed out that by rule 10 of the association any surplus funds might, in the discretion of the committee, either be divided among all the members in like proportion, or retained, and invested in such manner as they should think fit; and that therefore a member, who had been expelled from the society, and claimed to be restored to his membership, was claiming a benefit from the funds of the association, and therefore came within the very words of Jessel M.R. in *Rigby* v. *Connol.* (1) In the present case the plaintiff does not claim to participate in the funds of the union, and no question arises as to any right of his to such participation. He claims merely to restrain the defendants from misapplication of their funds. The case therefore comes within the decision of Fry J. in *Wolfe* v. *Matthews* (2), which was not, in my opinion, overruled by *Chamberlain's Wharf, Limited* v. *Smith.* (3) I observe that in *Swaine* v. *Wilson* (4) Lindley L.J. speaks of *Wolfe* v.

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(1) [1900] 2 Ch. 605.

(2) 14 Ch. D. 482.

(3) 21 Ch. D. 194.

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(1) 14 Ch. D. 482.
(2) 21 Ch. D. 194.
(3) [1900] 2 Ch. 605.
(4) 24 Q. B. D. 252.

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Matthews (1) as a case in which an injunction was granted, not directly to enforce an agreement, but to restrain a misapplication of funds, without any disapprobation. The provisions of rule 64 of this association were clearly framed with the object of preventing strikes, and the payment of strike pay, except in cases where certain conditions have been fulfilled, namely, where all proper and peaceful means have been tried to effect a settlement of the dispute with the employers, with the advice and assistance of the council of the association, and the sanction of the association has been obtained for the strike. The object of this action is not to enforce the agreement contained in the rules by declaring that the plaintiff is entitled to participate in the property or benefits of the association, but to prevent the association from being converted from what, as constituted under the rules, it is intended to be, namely, an association one of whose objects is to discourage and prevent unnecessary strikes by insisting upon certain salutary conditions being fulfilled before a strike is sanctioned, into an association which can at will dispense with all the conditions which under the rules were intended to make for peace. I think the collocation of the words "recovering damages for the breach of" with the words "directly enforcing" in s. 4 of the Trade Union Act, 1871, points to legal proceedings the object of which is the obtaining some personal benefit by the plaintiff. For these reasons I think that there is nothing in the provisions of s. 4 to prohibit the maintenance of such an action as the present.

But then it was said that the plaintiff was not the proper plaintiff in such an action; that, if he was bringing the action to enforce his own individual rights, then the case came within the prohibition of s. 4; but, if he was bringing it on behalf of the members of the association to maintain the status quo, and to safeguard the constitution of the association as defined by the rules, then the trustees were the proper persons to bring the action by virtue of s. 9 of the Act. The answer appears to me to be that, assuming that in general to be so, an individual member may nevertheless bring such an action, where it is plain that the trustees will not do so; and that it cannot be that there is no remedy in such a case. The case seems to me to come within the principle of those cases in which an individual member of a joint stock company incorporated under the Companies Acts has been allowed to sue in his own name to prevent something being done which is ultra vires on the part of the company, or where the majority of the members are proposing to do something in contravention of the rights of a minority. I am satisfied for the reasons given that the object of the action is not directly to enforce any benefit for the plaintiff individually; and it appears to me impossible under these circumstances to suppose that, merely because the trustees do not choose, or have put themselves in a position in which it is not practicable for them, to bring any action to prevent the proposed misapplication of the funds, the members of the association, or some of them, may entirely alter the objects and character of the association, and then say to the individual member who asks for an injunction to restrain them from misapplying the funds, that he has no right to bring the action, and that, inasmuch as only the trustees can do so, he has no remedy. The principle upon which Courts of Equity have proceeded in the cases to which I have alluded seems to me to be that, where a wrong of this kind is being committed, there must be some remedy; and therefore they have allowed a member or members of a company or association to sue as individuals, where the society is acting or proposing to act ultra vires, or where a majority is acting towards a minority in a manner contrary to natural justice.

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(1) 21 Ch. D. 194.

We have therefore to consider whether under the circumstances of this case the action is maintainable. The point has been taken that what is complained of by the plaintiff is a mere matter of the internal administration of the association, in respect of which no individual member of it has a right to claim the interference of the Court. The question therefore must be considered whether that is so, or whether what is proposed to be done really constitutes an alteration in the constitution of the association, diverting it from the very

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purposes for which it was brought into existence. That depends mainly on the construction of rules 64 and 65.

Dealing first with rule 64, it was admitted by the defendants' counsel that, on its initiation, the strike was not of such a character as to entitle the members of the union who were striking to ask for the benefit of the rule, or to justify the association in giving it to them. The men undoubtedly ceased work without the sanction of the association, and without giving the fourteen days' notice which by the rules incorporated in their contract of service they were bound to give. There having been a failure to give that notice, the effect of which, if given, might have been to provide an interval for reflection during which possibly the dispute between the employers and the men might have been settled, and a failure to obtain the sanction of the association, it is admitted that the conditions of rule 64 were not complied with. In my judgment the giving of strike pay under the circumstances would be not merely a matter affecting individual members of the association, or concerning its internal administration only, but something which would alter the most essential conditions and purposes of the association. One can well understand a workman, who had the interests of his class at heart, and who desired to support his fellow-workmen in everything that might reasonably be supposed to tend to their advantage and the improvement of their position, gladly joining an association which, at the same time that it efficiently protected its members in their relations with their employers, was so constituted that members of it would not have to throw up their employment by the orders or at the dictation of some members of the association, or unless and until all reasonable efforts had been made to preserve peace, and the existence of all the conditions which would justify a strike had been affirmed by the sanction of the association being given to a strike by the particular branch which was proposing to strike. Under the circumstances, in my judgment, the action is one of a character that is maintainable by an individual member of the union. I agree that, having regard to the provisions of s. 9, primâ facie the trustees may be the proper persons to take action for the purpose of safeguarding the property and constitution of the union; but I do not think that it is a condition precedent to the maintenance of the action by an individual member of the union that he should have applied to the trustees to take action for that purpose, where it is perfectly clear that the application would have been useless, as in my opinion it is in the present case, the trustees having assented to previous applications of the funds of the nature complained of by the plaintiff. The case seems to me to come within the cases in which it has been held that an individual member of a society is entitled to sue where something is proposed to be done which would be not only ultra vires on the part of the governing body of the society, but ultra vires on the part of the society itself. It is obvious that this is an action which is really brought for the benefit of the members of the association as a body. Of course the action is disapproved by those who are doing these unconstitutional acts, but we know that there is a considerable minority of the members of the association who disapprove of what is being done in regard to this strike as contrary to the constitution of the union. If in point of form it were necessary to add some words to make it appear on the face of the writ that the plaintiff sues on behalf of himself and other members of the association who disapprove of these payments on account of strike pay, then I think any such formal amendment as may be necessary for that purpose ought to be made.

Though, as I have said, it does not seem to me that it was ever really contended for the defendants that in its initiation the strike in this case was one which was justified under rule 64, it was contended that, having regard to what subsequently happened, as to which I will say a word or two presently, there was afterwards a strike in accordance with rule 64. Speaking for myself, I will say at once that I do not see how that contention can be maintained. There is no doubt that the men did cease work originally without the sanction of the association, and, inasmuch as they have never resumed work, and have ever since remained out on strike, I do not see how it can be made out that they ever ceased work a second time with the sanction of the association within the meaning of rule 64. In my opinion it is clear that they ceased work, and went out on strike, entirely of their own choice, and have remained out of work ever since. But it is said that, if the case does not come within rule 64, then rule 65 applies. I cannot assent to that contention. It was hardly disputed that, if the words of rule 65 were construed literally, they would not cover the case. There has been no lock-out by the employers, nor have the men been "thrown out" of employment in consequence of any action legally taken by the association. The fact is that the men went out of employment and on strike of their own accord, and have never been in employment since. It is quite true that, after the men ceased work, the association took a certain course in connection with negotiations for the resumption of work by the men, but that did not lead to the men being "thrown out" of employment, for they were then already out of employment, and it was therefore impossible to throw them out of employment. It is contended that the words ought not to be read literally, but that "thrown out of employment" should be read as equivalent to "unable to obtain employment." But that is not what the rule says. It may be the fact that the men, having gone out of employment, were unable to get back into employment by reason of having followed the advice given to them by the association. But it seems to me impossible to say that that amounts to being "thrown out of employment" within the meaning of the rule. I have no doubt, having regard to the collocation of the words "thrown out of employment" with the words "locked out," that the rule is intended to provide for cases where the continuity of an employment is broken in the first instance by such causes as are described in the rule, namely, through a lock-out, or through the men following the advice of the association in some matter. Upon the construction contended for on the part of the defendants, there would appear to be no limitation to the meaning of the words, and the rule would apply, not only to men who, being or having been in an employment at a colliery, are thrown out of it, but also to the case of men who are unable to get work at a colliery through following the advice of the association, though they may never have been employed at the colliery before. Assuming the facts to be such as I have mentioned, I do not think that the proposed payment of strike pay is authorized by either of the rules in question. The result so far is that the action is one which may be maintained by an individual member of the association, and the rules do not as a matter of law justify the proposed application of the funds.

I do not propose to say very much more with regard to the facts. But, stating the effect of them generally, in my opinion it is plain that the men did by their strike declare that, until a certain grievance which they complained of was remedied, they would no longer continue to work, i.e., they would not perform their contract of service any longer. It is to my mind also clear that the employers with equal firmness declined to remedy the alleged grievance of the men. Under these circumstances the only proper inference seems to be that the men repudiated their contract of service, and the employers accepted that repudiation as final. Negotiations subsequently took place through Mr. Pickard with a view to the men being allowed to resume work; which primâ facie might be supposed to mean that the men were going back with the intention of no longer using the strike as an engine to procure a remedy for their grievance, but simply for the purpose of resuming work as before the strike. But the resolution passed by the men and the correspondence clearly shew that the men never meant to resume work as before the strike, but only intended to go back for the purpose of putting the strike which had already commenced in order under rule 64. It would have been a sham return, and a sham resumption of work. The employers, knowing from the statement of the men themselves what their object was, positively declined to restore the old contract, the repudiation of which they had already accepted. Under these circumstances it appears to me that neither rule 64 nor rule 65 has any application to the case. The defendants' counsel struggled to bring the case within the rules on the ground that the original contracts of service and the original employment of the men continued from first to last, the

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employers never having accepted the repudiation by the men of their contracts. That being the matter in contest, it was said that there had been a misdirection by Grantham J., because he did not ask the jury whether the employers had done anything to keep the contract of service or the employment alive, or, to put it in another way, whether the employers had accepted the repudiation of their contracts by the men. I do not say that a judge can, by asking counsel whether he wants any further questions put to the jury, relieve himself of the obligation of putting any question which may be essential to determine the case; but, when, as in the present case, counsel tells the judge at the trial that there is really no question of fact, but the only question is one of law, I do not think that, after that, an application for a new trial on the ground of misdirection, because a certain question was not put to the jury, ought to be much encouraged. But in my view, having regard to the admitted conduct of the parties to this dispute on both sides, there was a presumption which arose that both parties were treating the contract of service, or the employment—perhaps one ought to say employment, having regard to the terms of the rules—as at an end. Under these circumstances, it seems to me as a matter of law that, unless there was some evidence to rebut that presumption and upon which a jury could reasonably answer the suggested question in a manner favourable to the defendants, there ought not to be a new trial on the ground of misdirection. I think there was no evidence for the jury that the employers by anything which they did had ever treated the contract or the employment as alive after the repudiation of it by the men. That being so, I think we ought to deal with the case on the assumption that the employment had come to an end by reason of the men's conduct in striking on June 30, and the employers' conduct in acquiescing in that determination of the employment. I ought perhaps to say a word with regard to the suggestion that the employers had done something to shew that they were treating the contracts of service as alive by taking out summonses against the men who struck under the Employers and Workmen Act. It seems to me perfectly clear that those proceedings were merely for the purpose of recovering damages from the men for their breach of contract in leaving their employment without giving notice. If an employer wrongfully dismisses a servant without giving him notice, the servant is entitled to damages, which would in general be measured by reference to the wages which he would have earned during the period which would have been covered by the notice, as for instance a month's wages in the case of a domestic servant. Similarly, in the converse case of a servant wrongfully leaving his employment without giving notice, the master is entitled to recover damages which primâ facie would be measured by reference to the value of the services of the servant during the period covered by the notice which ought to have been given, in this case fourteen days. In my opinion the taking out of those summonses, and the recovery of damages upon them, were in no sense an affirmance of the continued existence of the contract of service or employment. Under these circumstances I see no reason for ordering a new trial. I am of opinion that on the undisputed facts of the case and the documents the question in the case is really one of law only. Therefore any question as to misdirection or misreception of evidence at the trial becomes immaterial. For these reasons I think that the application should be dismissed.

STIRLING L.J. This is an action brought by a single member of the defendant association for the purpose of obtaining an injunction to restrain misapplication of the funds of the association and dealing with them contrary to the rules.

The defendant association is a trade union registered under the Trade Union Act, 1871, and it is admitted to be one which, before the passing of that Act, would have been entirely illegal. The rights of the association and its members depend therefore on the terms of that Act. One of the objects of the Act was to prevent the misapplication of the funds of trade unions; and it is provided by s. 8 that the real and personal estate belonging to any trade union is to be vested in trustees for the use and benefit of the trade union and the members thereof; and by s. 9 such trustees are authorized to bring and defend actions concerning the property, right, or claim to property of the trade union. There are trustees of the property of the defendant association, and they therefore have a statutory right to bring an action to prevent misapplication of the property of the union. If, however, for any reason they do not do so, but acquiesce in its misapplication, it is the right of any one of their cestui que trusts, as the members of the association are expressly declared to be under the terms of the Act of Parliament, to bring an action to restrain such misapplication. It is said, however, that the statute shews that primâ facie at any rate the trustees are the only proper plaintiffs in such an action. There is a good deal to be said in favour of that view, and I will assume it to be well founded. Still there are certain exceptional cases, in which it is well established with reference to joint stock companies that the Court will allow a shareholder to sue, although the company itself is generally speaking the only proper plaintiff in an action with reference to the property of the company. One class of such cases is where an action is brought by a shareholder to prevent an application of the funds of the company to a purpose which is entirely beyond the powers of the corporation. In such cases a single shareholder may maintain the action, not professing to sue for himself and all other shareholders, but simply in his own individual right. It is contended on behalf of the plaintiff that an analogous rule ought to apply to the members of a trade union, and that, where in the case of a company a shareholder would be entitled to maintain an action to restrain an application of the company's funds unauthorized by the constitution of the company, a member of a trade union ought similarly to be allowed to maintain an action to restrain an application of the funds of the association otherwise than in accordance with the rules of the union, by which, subject of course to the provisions of the Trade Union Acts, the rights of all parties are governed. Unless there is something in those Acts, or in the nature of the constitution of trade unions, to prevent the application of such an analogy, it would seem to me that we ought to give effect to this argument.

First of all it is said that the provisions of s. 4, sub-s. 3, of the Trade Union Act, 1871, prevent the Court from so doing. By that section the Court is prohibited from entertaining any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement for the application of the funds of a trade union, not generally, but in three specified cases. The objects of a trade union may, and in the present case do, include others than those mentioned in this section; and the Act contains nothing to prevent the Court from entertaining a legal proceeding for the purpose of enforcing agreements with respect to those other objects. The section clearly cannot be read as prohibiting the Courts from entertaining proceedings for enforcing every agreement with reference to the funds of trade unions. It is said, however, that the present action falls within a prohibited class, namely, the class of actions which are brought with the object of directly enforcing an agreement for the application of the funds to provide benefits to the members. In my opinion it does not. The word "directly" is important, and ought to have effect given to it. If, for example, the object of the action were to establish the plaintiff's title to a benefit or benefits provided for members of the association, then it would fall within the prohibition, as has been decided in *Rigby* v. *Connol* (1) and *Chamberlain's Wharf, Limited* v. *Smith* (2): a fortiori if the action claimed any such benefit for the plaintiff individually. But the plaintiff's title as a member is not disputed, and no application of the funds in favour of the plaintiff is claimed by the action. All that is sought is that the funds shall not be dealt with otherwise than in accordance with the rules. The plaintiff is simply insisting on a right which ought to have been enforced by the trustees on behalf of the whole body of the members of the defendant association, but which they have neglected or omitted to enforce. It is truly said that the result will be that, if the plaintiff ever becomes entitled to any benefit under the rules, there will be funds available for

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(1) 14 Ch. D. 482.

(2) [1900] 2 Ch. 605.

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that purpose which would otherwise have disappeared; but in my opinion the object of the action is not directly to enforce any agreement to provide a benefit for him, but at most only to do so indirectly. Indeed, it seems to me that the present action is a very good example of an indirect enforcement of such an agreement. It may be, as is said, that what the plaintiff personally contemplated as the result of the action was the preservation of this fund for his own benefit; but, if so, that is merely the motive of the plaintiff, and the true object of the action is different.

It is said, however, that the analogy to the case of a company is inapplicable, because the only instrument by which the affairs of the trade union are regulated consists of the rules, every one of which is by the terms of rules 2 and 12 capable of alteration in the way there pointed out, so that it cannot be said that any proposed application of the funds is beyond the powers of the union. In a sense this is true; but still the analogy seems to me to hold. If funds are provided by agreement between various persons, and placed in the hands of some of them or of third parties, to be applied to specified purposes, then, in the absence of express provision, the funds cannot be applied otherwise than in accordance with the agreement, unless all parties interested concur; and where the agreement contains express provisions, which enable the mode of application of the funds to be altered, each party is entitled to insist that, unless and until an alteration has been made in accordance with those provisions, the funds shall be applied for the purposes originally agreed on. As regards the necessity for a formal alteration of the rules I may refer to some observations of Cotton L.J. in the case of *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*. (1) There the action related to an entirely different matter from the present, but the decision shews that rules capable of alteration must be adhered to until altered. The company was one which was incorporated under the Companies Act, 1862. The articles of association contained no provision for the removal of directors from their office before the period for which they were elected had expired.

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(1) (1882) 23 Ch. D. 1.

The company, however, in general meeting had removed the directors, and appointed others in their places, and an action was brought in the name of the company against the existing directors to restrain them from acting. In dealing with the question Cotton L.J. made these observations: "There is nothing in the Act or in the articles which directly enables a general meeting to remove directors; but the way it is put is this—that there is power in these articles, as there is power in the Act, by a meeting duly called, to pass a resolution altering the articles; and it is said that here there was a resolution, which would have been effectual to alter the articles, that these directors, whom the articles did not authorize to be removed, should be removed. Now in my opinion it is an entire fallacy to say that, because there is power to alter the regulations, you can, by a resolution which might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case. It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very different thing to pass a general rule applicable to every one who comes within it, and to pass a resolution against a particular individual, which would be a privilegium, and not a law." In my judgment therefore, seeing that nothing has been done in the present case in the way of alteration of the rules of the association, an action of this kind may be maintained, if the facts justify it, and the action is properly constituted.

The further questions therefore arise whether the rules of the union, as they at present stand, have been violated, and, secondly, whether circumstances have occurred which give a right of action to the plaintiff, as a member of the association. In dealing with the first question regard must be had to the provisions of rules 64 and 65. With regard to the construction of rule 64 I am bound to say that I have felt considerable doubt whether the proposed payment of strike pay might not be justified under it. It provides that, in order that members may be entitled to receive strike pay, they must have been permitted to cease work by the sanction of the association in accordance with the rules. What took place was this: There has been a continuous cessation of work by the men from the time when the strike originally took place down to the present time. Previously to a date somewhere about July 17, that cessation was without the permission or sanction of the association, but subsequently to that period the cessation of work was sanctioned by the association. It is contended on behalf of the plaintiff that, in order to bring rule 64 into operation, the sanction or permission of the association must be given before the men in the first instance cease from working. If that is the true construction of the rule, then that condition has not been satisfied in the present case. It may be said that the construction of the rule contended for by the plaintiff is more in accordance with what is primarily the meaning of the words used; but I must say that I have felt some doubt whether, without unduly stretching the meaning of the language, the men might not be said to have been permitted to cease work by the sanction of the association from the time at which in the present case that sanction was given. But, as my brothers take the other view with regard to the construction of the rule, I cannot say that I feel sufficiently clear that the view which I have suggested is correct to differ from them; and I come the more readily to the same conclusion as they have come to, because in my view the rule is capable of being altered so as to authorize the payment of strike pay in such circumstances as exist in the present case without doing any great violence to the existing constitution of the union. With regard to the construction of rule 65 I agree with what has been said by my brother Vaughan Williams. I arrive therefore at the conclusion that the application of the funds of the association proposed to be made by the defendants is in violation of the rules as they at present stand. The question then arises whether the action is properly brought by the plaintiff. I must say that in my view the action was at the outset not properly constituted, the persons in whom the funds of the association are legally vested not having been made parties to it. I have never known of an action of this kind in which the trustees or the company in whom the funds were vested, the misapplication of which was sought to be restrained, were not brought before the Court. By Order XVI., r. 11, however, power is given to the Court or a judge, upon such terms as may be deemed just, to add at any time the names of any parties, either as plaintiffs or defendants, who ought to be joined, or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. That applies of course to the Court of original jurisdiction; but by Order LVIII., r. 4, the Court of Appeal has all the powers and duties as to amendment or otherwise of the High Court. It appears to me that under those rules the trustees have now properly been made parties to the action as defendants. It was objected by the defendants' counsel in the course of the argument—an objection which would have been more material, if the trustees had not appeared—that there was no evidence of any application by the plaintiff to the trustees of the association, requesting them to bring such an action, or of any refusal on their part to do so. But the trustees have appeared before us, and the counsel who appears for them has stated that they took the view that they were bound to apply the funds in accordance with the views of the association; and we know very well what the views of the association on the subject are. I do not think that it was necessary for the plaintiff to make what would have been a merely formal application to the trustees. I think that there is ample ground for holding that any application by the plaintiff to the trustees to institute proceedings for themselves would have been absolutely futile. That being so, I do not think that it was necessary, before the plaintiff could maintain the action, that there should previously have been such an application by him to the trustees.

On these grounds I think that the action is now properly constituted, and that a case has been made out for the granting of an injunction. In such cases, where there is power to alter the rules of the association, the course is sometimes taken of not granting the injunction immediately, but postponing it, in order to give an opportunity of amending the rules. That, however, is entirely a matter of discretion; and, as we have come to the conclusion that the proposed application of the funds is contrary to the rules as they stand, and it is uncertain whether any alteration, and, if so, what alteration, of the rules will be made, it seems to me that the proper course will be to continue the injunction which has been granted, but that it ought to be in such a form as not to prejudice or affect any right that the association may have to alter the rules.

MATHEW L.J. I concur in the view taken by my learned brothers in this case, and I do not propose to pursue every step of the arguments which have been addressed to us. Details have been sufficiently dealt with in the judgment of my Lord and that of my brother Stirling L.J. I propose to state, as briefly as I can, the reasons why I concur in their judgments.

Dealing first with the question of misdirection, the argument is that the proper inference, or at any rate an inference reasonably possible, from the evidence is that the employers had not accepted the repudiation of their contract of service by the men, and were willing to allow the men to resume work under it; and that under these circumstances the strike was really only a kind of proposal on the part of the men to give up their employment which was never accepted by the employers. This appears to me to be an extraordinary travesty of the facts of the case. We know what led to the strike. The employers had taken up the position, in reference to this dispute about what was called the bag dirt, that they were entitled to make deductions from the amounts payable to the colliers in respect of the men employed by them to do the work which they said ought to have been done by the colliers. There had been a long-standing dispute on the subject, and the course taken by the employers with regard to those deductions brought this dispute to a point at which there was great irritation on the part of the men. The men accordingly took action, and intimated to the employers that, unless they agreed to redress the men's grievance in that respect, they would strike; the employers on the other hand adhered to the view that they were right, and declined to alter the course which they had previously pursued, or to redress the men's supposed grievances; and thereupon the men struck. It is argued that the proper inference is that that was not a termination of the employment. I should say that it was impossible to come to any other conclusion on the facts than that it was. What happened in substance comes to this. The men begin by charging the employers with a breach of contract, and say that, if the matter is not set right, they will repudiate the contract of service; and thereupon the employers insist that what they have done is in accordance with the contract, and refuse to make any concession; and the men thereupon in effect say that they repudiate the contract, and strike. I should have thought that, upon the mere statement of the undisputed facts with regard to what happened, it was clear that there was no reasonable evidence for the jury on the question which it is said ought to have been left to them by the learned judge; but our attention was called to the correspondence and telegrams; and, if anything was wanted to make the position of the men perfectly clear, it is made so by reference to that correspondence. It plainly appears from it that the men were determined to strike. They were advised by the association to go back to work, and they met and passed a resolution that they would only do so for the purpose of striking, that is to say, in order to give the requisite fourteen days' notice. The employers knew that, and the men knew, as appears from the correspondence, that the employers were not willing to take them back on such terms. The proposal to resume employment was a sham under such circumstances, and the men never got back to their employment. We have had a long argument to the effect that the contract was nevertheless all along subsisting; that the men were willing to go back under it and the employers were anxious for them to do so; but that subsequently the employers changed their minds, and, as it were, locked the men out. I think that the evidence entirely fails the defendants on this point, and therefore there is no ground for saying that there was any misdirection.

I now come to what were treated in the first instance as the real questions in the case, namely, the effect of the legislation as to trade unions and that of the rules of the defendant association. Our attention has been called to the Act of 1871, and, without dwelling at present upon the point which arises under s. 4, we have two sections, namely, ss. 8 and 9, which point out what is the position occupied by trustees of a trade union. It was in effect urged that those sections are governed by the provisions of s. 4, and that no action could be brought even against the trustees for a breach of trust. It is only necessary to read the sections to see that the trustees intended to be called into existence are trustees with the ordinary liabilities incidental to trusteeship. A trustee with no liability for a breach of trust is an anomaly which I have not yet encountered. It seems to me clear that the trustees of a trade union are subject, in respect of the funds vested in them, to a liability similar to that imposed on other trustees. If any doubt existed on the point, it is cleared up by s. 10, which provides that a trustee of a trade union registered under the Act shall not be liable to make good any deficiency which may arise or happen in the funds of such trade union, but shall be liable only for the moneys which shall be actually received by him on account of such trade union. Can it be doubted that, in respect of the money actually received by him, he would be liable to an action as a trustee? Another important section to which attention must be called is s. 14, which provides that the rules of every trade union registered under the Act shall contain provisions in respect of the several matters mentioned in the 1st schedule to the Act. That schedule mentions, among the matters to be provided for by the rules, the whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby. Then turning to the rules which were made in conformity with those provisions of the Act, we find that rule 2 provides that these rules shall be for the government of the association, and the protection of the members, and that no new rule shall be made, nor any of the rules therein contained, or thereafter to be made, amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting. Then it is provided by rule 22 that there shall be a treasurer nominated by a branch, and elected by a majority of members throughout the association; that his duties shall be to receive and pay all moneys belonging to the association; and that he shall under no circumstances pay, lend, or appropriate the funds of the association to any purposes whatever, except the same be in accordance with the rules, resolutions, and minutes of the association, and in all cases such payments shall be sanctioned by the council. Then by rule 25 the treasurer is not to hold in his hands at any one time a larger sum than 300*l.*, but is to hand over any sum above that amount to the trustees, who are to invest it in the manner directed by the rules. Under these circumstances there can be no question, I think, as to the position of the trustees. The effect of the argument that they are the only persons to whom a right is given by the Act to sue is that in such a case as this there is no remedy, because they clearly cannot sue themselves. Here they were acting with the sanction of the association in all they did; and how is it possible to suppose that there could be no remedy to prevent a misappropriation of the funds of the union to which they were parties, unless they would consent themselves to be plaintiffs in the action? Any difficulty as to the mere matter of form, if there was any such difficulty, has, I think, been entirely overcome by the course which has been taken of making the trustees defendants in the action, and so bringing them before the Court.

We now come to the two most important rules in this case, namely, rules 64 and 65. A man, when considering whether he shall join such an association as this, may be supposed to look to the rules in order to ascertain what its objects and character are. It would be one thing to join an association where every precaution is taken to prevent unnecessary strikes as well as to support men who have struck legitimately; it is quite another thing, where the rules throw the whole control of matters into the hands of the workmen immediately concerned, and permit them at a time of anger and irritation to take such precipitate action as may be destructive of their own interests, and seriously imperil the interests of their employer. Rules 64 and 72 of this association both indicate that any man in joining this union would be joining a union in which every precaution would be taken to prevent that disastrous thing, a strike. Rule 64 provides that the men may be permitted to cease work only with the sanction of the association in accordance with the rules. What did the men do here? They proceeded in effect to form a new union, and confer upon themselves the power of terminating their employment, and striking without any of the precautions pointed out by the rule in question—a rule which to my mind is fundamental, and is part, and a most important part, of the charter of the association. They struck and deserted the colliery without obtaining the sanction of the association. Then, when the question of strike pay arose, they were told at once that they were wrong, and that they ought not to have struck. The question then was how they were to set themselves right. What they were advised to do was to offer to go back to work, but they were told not to sign a new contract, it being all important that the old contract should appear to be still in existence. They accordingly did go back, and offered to resume work, refusing to sign any new contract, but to this the employers would not agree, and they were not allowed to resume work. Now it is said that they have brought themselves, even if they violated the provisions of rule 64, within the protection of rule 65. There can be no doubt, I think, that that was the object with which this elaborate diplomacy was adopted. They were sent back in order to try to maintain the original contract and the original employment under that contract, so that it might be said that rule 65 applied. I am clearly of opinion that they have not brought themselves within that rule. It is idle, I think, to say that there was a lock-out, or that they were thrown out of employment within the meaning of the rule. They had thrown themselves out of employment long before. They had no right to go back to the employers, and if the employers would not have them back, say that they had been thrown out of employment by the conduct of the employers. Then it was urged that, supposing that to be so, and that the plaintiff is right in saying that, as matters stand, the payment of strike pay would not be in accordance with the rules, still it would be a mere irregularity which could be set right: that it was not a fundamental matter essential to the institution provided for by the rules. The argument on this point was certainly ingenious. It was said that, though the case is not within the rules as they stand at present, they might be altered under rule 2, and the union might be willing to alter and amend the rule, so as to enable the association to sanction a strike which had been at the outset an irregular and improper strike, and thus place the men in the same position as if they had observed the rules. When such a resolution is passed, it will be time to consider the question how far, under the provision for altering the rules, there could be retrospective legislation of that sort. It is sufficient to say that there is no such amended rule before us, and it seems to me idle to say that, because such an amendment of the rules might possibly be made, the conduct of the union in violating the existing rules was a mere irregularity, and nothing more. So much as to rules 64 and 65, which seem to me to involve a judgment on their construction adverse to the defendants.

Then we have to consider s. 4 of the Trade Union Act, 1871. It is argued that, supposing the union to have been wrong in granting strike pay, and to have violated the provisions of the rules, that is not a matter which can be made the subject of an action by reason of the provisions of s. 4. The legislation on the subject of trade unions is somewhat remarkable. The Trade Union Act, 1871, was the first statute to legalize trade unions, and to confer on workmen such liberty as is given to them of establishing such unions; and it is thereby enacted that the legalization of trade unions provided for by the statute shall not enable actions to be brought with the object of directly enforcing any of certain specified agreements, among

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which is an agreement for the application of the funds of a trade union to provide benefits for members. It is clear that the intention of the Legislature was that the internal affairs of the union should be something which must be managed among the men themselves, and that they were not to have the assistance of the Courts to enforce their regulations among their members. It is peculiar legislation which thus partially legalizes trade unions; but there it is, and we have to interpret it. The question thus arises whether this is an action brought with the object of directly enforcing an agreement within the terms of sub-s. 3 of s. 4. It is argued for the plaintiff that this is merely an application for the purpose of protecting the funds of the association, and compelling the trustees to do their duty and maintain the status quo; that it is not an application for the benefit of the plaintiff, who will remain, after the injunction is granted, in precisely the same position as before; and the action is therefore not one prohibited by the section. It is said on the other side that there are authorities which dispose of the case in favour of the defendants. Two decisions were cited, which are no doubt authorities entitled to the highest respect, namely, that of Jessel M.R. in *Rigby* v. *Connol* (1) and that of the Court of Appeal in *Chamberlain's Wharf, Limited* v. *Smith.* (2) Those cases are in my opinion clearly distinguishable from the present case. In each of them the action was brought to prevent the expulsion of the plaintiff from a society. It cannot be doubted that the object of the plaintiff in each of those cases was to secure for himself the benefits of the association. He was not representing the interest of any one else in the action. It was therefore held that the case came within the spirit and also the letter of the Act. Then we have the decision of Fry J. in *Wolfe* v. *Matthews* (3) and that of the Scottish Court in *M'Laren* v. *Miller* (4), which no doubt is not binding upon us, but is a valuable statement of judicial opinion, to the effect that such an action as that in the present case is maintainable. I think these decisions are in

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(1) 14 Ch. D. 482.

(2) [1900] 2 Ch. 605.

(3) 21 Ch. D. 194.

(4) 7 R. 867.

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point; and I agree that the judgment of the Court below should be affirmed.

Application dismissed.

Solicitors for plaintiff: *Steadman, Van Praagh & Gaylor, for A. Neal, Sheffield.*

Solicitors for defendants: *Corbin, Greener & Cook, for Raley & Son, Barnsley.*

Solicitors for trustees: *Marsh, Sherwood & Hart, for Carrington & Co., Barnsley.*

E. L.

[IN THE COURT OF APPEAL.]

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LORD MOSTYN *v.* FITZSIMMONS.

Landlord and Tenant—Lease—Renewal "at Costs of Lessee"—Costs of Reference and Award as to Amount of Fine payable on Renewal.

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term on payment of a fine calculated (in part) upon the full improved annual value of the premises at the time of renewal, such value to be determined by the landlord's surveyor or, at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held (reversing the judgment of Wright J.), that the costs of the reference and award were payable by the lessee under the covenant, as necessary costs of the renewal.

APPEAL from the judgment of Wright J. (1) upon an award stated in the form of a special case under s. 7 of the Arbitration Act, 1889, from which the following facts appeared.

By a lease made in 1860 the Hon. Thomas Mostyn demised to Thomas Parry certain premises in Llandudno for seventy-five years from Christmas, 1860. By a lease made in 1863 Lady Henrietta Mostyn and others demised to Joseph Hughes

(1) [1902] 1 K. B. 512.

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Mostyn (Lord) v. Fitzsimmons.

certain other premises in Llandudno for seventy-five years from Christmas, 1860. Each lease contained a covenant for renewal in the following terms: "The lessors, their heirs or assigns, will at any time during the said term, upon request and at the costs of the lessee, his executors, administrators, or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired, and the full improved annual value of the said premises at the time of such renewal (such value to be determined by the said surveyor or at the option of the lessee by the award of two referees or their umpire), renew or cause to be renewed the said term for the further term of seventy-five years from the date of such renewal at the like rent, and subject to the like covenants and conditions as are herein reserved and contained, including this present covenant for renewal." In the year 1900 T. H. Fitzsimmons (called throughout the award the lessee) claimed to be entitled to the premises comprised in both indentures of lease for the residue unexpired of the respective terms thereby granted, and Lord Mostyn (who was called the landlord) claimed to be entitled to the premises as landlord in reversion expectant on the determination of the terms of years, and in the meantime subject to the indentures of lease. The lessee having applied to the landlord for a renewal of the terms for a further term of seventy-five years from Christmas, 1900, differences arose between the parties as to the amount of the fines payable by the lessee to the landlord for or in respect of the renewal; the lessee thereupon gave notice of his desire to have the full improved annual value determined by the award of two referees, or of an umpire appointed by them as provided by the leases. The lessee and the landlord thereupon each appointed a referee, and the referees appointed an umpire. A question was raised before the umpire as to his power or discretion over the costs of the reference and award; and it was contended by the landlord that on the true construction of the leases the lessee was only entitled to obtain a renewal of the term at his own costs in all things, including the costs of both parties of and incidental to the reference and award, and that those costs had not been referred to the umpire to deal with, while the lessee contended that a costly reference extending over three days was not such a determination by two referees or their umpire as was contemplated by the leases, and, further, that in any event the costs of the reference and award were in the discretion of the umpire, who had power to deal with them under the Arbitration Act, 1889.

The questions for the opinion of the Court were, first, whether on the true construction of the leases the costs of renewal to be paid by the lessee included the costs of the reference and award; and, secondly, whether, whatever construction might be placed on the leases in relation to the costs of the reference and award, the umpire had any power or discretion to deal with those costs.

Wright J. held that the costs of the renewal which were to be paid by the lessee were the ordinary conveyancing costs only, such as the costs of drawing, settling, and completing the new lease, and that they did not include the costs of the reference and award, which were in the discretion of the umpire. He therefore gave judgment for the lessee upon the special case.

Montague Lush, *K.C.*, and *J. C. W. Madden*, for the landlord. The renewal of the lease is for the benefit of the lessee, and it is therefore a reasonable provision that he should pay all costs which are necessary for the purpose of that renewal. Having regard to the terms of the covenant, the costs of this reference and award were necessary for the purpose of the renewal. They are therefore costs which within the terms of the covenant are payable by the lessee. The judgment of Wright J. practically gives no effect to the words "at the costs of the lessee" in the covenant; for without those words the lessee would have had to pay the ordinary conveyancing costs of the new lease.

By s. 2 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), a submission, unless a contrary intention is expressed therein, includes the provisions set forth in the 1st schedule to the Act, among which is a provision that the costs of the reference and the award shall be in the discretion of the arbitrators or umpire. Here the covenant is the submission, and a contrary intention is expressed therein, namely, that the lessee shall pay the costs of this reference and award.

Marshall, K.C., and *E. P. Hewitt*, for the lessee. It is a fallacy to assume that the renewal is only for the benefit of the lessee: it is for the benefit of both parties. It is submitted that the parties presumably contemplated by the words "at the costs of the lessee" the ordinary conveyancing costs which a lessee has to pay, and that it was intended to leave the costs of an arbitration under the covenant to be dealt with in the ordinary way by the arbitrators or umpire under s. 2 of the Arbitration Act, 1889. If the parties had intended that they should in any event be borne by the lessee, they would surely have so provided in more explicit terms. The effect of the construction contended for by the landlord might be most unjust; for, according to it, the landlord, by claiming an excessive amount as a fine, might drive the lessee to an expensive arbitration of which he would have to pay the costs.

[They cited *In re Gray* (1), *Lock* v. *Furze* (2), and *Wortham* v. *Lord Dacre.* (3)]

VAUGHAN WILLIAMS L.J. I wish to begin by pointing out that there does not appear to be any question here as to the reasonableness of the amount of these costs, or any suggestion that the charges of the arbitrators were too high. The only question here is with regard to the construction to be put upon the covenant made between the parties to the lease; that is to say, whether the costs thereby specially dealt with include the costs of this reference and award. In my judgment, having regard to the terms of the covenant, they do. I do not myself see the applicability of the cases which have been cited with reference to the liability of lessees to payment of costs, independently of any express provision in regard thereto. In cases of that kind, there being no such provision, the liability to pay the costs has to be determined with reference

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(1) [1901] 1 Ch. 239.
(2) (1865) 19 C. B. (N.S.) 96.
(3) (1856) 2 K. & J. 437.

Vaughan Williams L.J.

to the question, in whose interest the particular expenses in question must be deemed to have been incurred; whether in that of the lessee, as in the case of the expenses of a lease, or in that of the lessor, as in the case of the expenses of the counterpart. I do not see what bearing those cases can have upon the present case, in which the question depends upon the express words of the covenant. I hardly think that Wright J. would have come to the conclusion at which he arrived, looking only at the question whether the words of the covenant are wide enough to cover these costs. He appears to have thought that, if the words of the covenant received what I should call their natural meaning, it would give an opportunity to an unreasonable lessor, by claiming an extravagant sum as a fine, to force the lessee to incur heavy costs, which, if the lessor were reasonable, would be quite unnecessary. But in truth the lease does not appear to contemplate the lessor's making, or having any opportunity of making, any such claim. It does not provide that the lessor shall make a claim, and that, if the lessee thinks the amount claimed excessive, there shall be an arbitration. What is contemplated is simply that the lessee shall have a right to have, if he wishes it, a renewal of the lease; and, upon his exercising that option, the fine is to be determined, either by the landlord's surveyor, or, at the option of the lessee, by arbitration, without the landlord's making, or having any opportunity of making, any claim. I dare say that in practice in such cases, if the landlord's surveyor is a person in whom the tenants have confidence, a lessee, who is thinking of claiming a renewal of his lease, might ask him at what sort of figure he is likely to fix the fine; and, to oblige the lessee, he might mention a figure; but in so doing he would not be performing any function which he had to exercise on behalf of the landlord. In my judgment the costs of the arbitration and award in this case are within the covenant, as being part of the necessary expenses of the renewal of the lease, having regard to the manner in which the lessee exercised his election as to the mode of determining the value of the premises. For these reasons I think that the appeal must be allowed.

STIRLING L.J. I am of the same opinion. The question is whether the costs of the reference and award in this case are included in the costs contemplated by the covenant on the part of the lessor upon the request and "at the costs of the lessee" to grant a renewal of the term created by the lease. Wright J. held that the natural meaning of the words of the covenant is that the lessee is only to pay the ordinary conveyancing costs, such as those of the preparation and execution of the new lease. With great respect to him, I think that he has departed from the language of the covenant. What is to be renewed is the term. I think the fair and natural meaning of the covenant is that the lessee is to pay all costs necessarily and properly incurred for the purpose of the renewal of the term. The lease provides that the fine which is to be paid on renewal is to be calculated on the full improved annual value of the premises at the time of the renewal. That value may be ascertained in one of two ways at the option of the lessee—namely, either by the landlord's surveyor, or by a reference to arbitration. Here the lessee elected to have it ascertained by arbitration. It appears to me that the costs necessarily and properly incurred in the arbitration are included in the costs contemplated by the covenant. It might be a different question if the landlord had misconducted himself in any way. With regard to the case of *Wortham* v. *Lord Dacre* (1), the costs there in question were necessitated by the way in which the landlord had dealt with the property. Here the costs in question necessarily arose from the election made by the lessee.

MATHEW L.J. I am of the same opinion. In order that a renewal of the term might be secured, it was necessary to ascertain the amount of the fine to be paid on renewal. That amount might be ascertained, either by the lessee's agreeing to accept the value fixed by the landlord's surveyor, or, if he preferred it, by arbitration. The latter course was adopted. How can it be said in such a case that the expenses of the investigation before the arbitrators are not part of the costs of renewal within the meaning of the covenant? My learned brother appears to have been impressed by the consideration that this construction would enable an unreasonable lessor to impose an undue burden upon the lessee. I am not disposed, as at present advised, to say that in every case the costs of such an arbitration would be cast upon the lessee. Where the circumstances are such as to point to the conclusion that the lessor has acted arbitrarily and unreasonably in refusing an offer made by the lessee, and has thereby compelled the lessee to have recourse to an arbitration which ought not have been requisite, then it may be necessary to decide whether in such a case the costs of the arbitration would come within the meaning of such a covenant as this, as being the necessary costs of the renewal. In this case I think it is clear that they do come within the covenant. I therefore agree that the appeal must be allowed.

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(1) 2 K. & J. 437.

Appeal allowed.

Solicitors for landlord: *Hulberts, Hussey & Metcalfe.*

Solicitors for lessee: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

E. L.

1903
Jan. 16.

BLORE *v.* GIULINI.

Lease—Power to Lessee to determine Lease on Notice given—Avoidance of Covenants—Omission to reserve Lessor's Rights—Liability of Lessee for past Breaches of Covenant.

A lease for fourteen years provided that the lessees should have power to determine the lease at the end of the first seven years upon giving six months' notice in writing, and that "in such case this present indenture and every clause, matter, and thing herein contained shall, upon the expiration of the said notice, cease and determine and be void, anything hereinbefore contained to the contrary notwithstanding"; the proviso, however, did not contain the usual reservation of the lessor's rights in respect of existing breaches of the lessees' covenants :—

Held, that, upon the determination of the lease by the lessees under the above power, the lessor was entitled to sue them for existing breaches of their covenants notwithstanding that his right to do so was not expressly reserved.

POINT of law raised on the pleadings.

The plaintiff granted to the defendants a lease of a house for a term of fourteen years from March 25, 1895. The lease contained a covenant by the lessees to repair, and a proviso that it should be lawful for the lessees to determine the demise at the end of the first seven years of the said term upon delivering to the lessor six calendar months previous notice in writing, "and in such case this present indenture and every clause, matter, and thing herein contained shall, upon the expiration of the said notice, cease and determine and be void, anything hereinbefore contained to the contrary notwithstanding"; but it did not contain the usual clause to the effect that the exercise of the above power by the lessees should be subject to the lessor's rights and remedies for existing breaches of the lessees' covenants. The defendants duly determined the lease by a notice expiring on March 25, 1902, when they gave up possession of the premises. At that time the premises were alleged to be out of repair. The plaintiff brought this action for breach of the covenant to repair.

The defendants contended in their defence that as and from the determination of the lease they were exonerated and discharged from all liability under the covenants. It was ordered that the question of law raised by the defence should be tried first, the question of the amount of damages (if any) being reserved.

W. Stewart, for the plaintiff.

Frankau, for the defendants. By the express terms of the lease, upon the expiration of the notice the covenants determined and became void. The covenant to repair being gone, there is nothing on which the plaintiff can sue. The ordinary precedents of leases given in the text-books on conveyancing contain a proviso that the notice to determine the lease shall not take effect until the tenant has performed all his covenants, or that the rights and remedies of the lessor in respect of any breaches of the lessee's covenants shall be reserved: see Key and Elphinstone's Precedents in Conveyancing, 6th ed. vol. i. pp. 704, 705; Prideaux's Precedents in Conveyancing, 17th ed. vol. ii. p. 66. Unless these usual provisoes are to be regarded as wholly superfluous, the omission to insert them in the present lease affords a good defence.

The present case is not like that of the ordinary determination of a lease by effluxion of time, for in such a case there is nothing to make the covenant void, and the obligation under it continues until barred by the Statute of Limitations.

The case of *Hartshorne* v. *Watson* (1) may appear to be against the defendants' contention. There the lease provided that, in the event of non-payment of rent, the lessor might enter upon the demised premises and "the same have again as if the said indenture had never been made." It was held that nevertheless an action of covenant lay for the rent reserved. But the case is distinguishable, for there the covenants were left unaffected by the re-entry.

WRIGHT J. This defence cannot be supported. As a matter of common sense, it is impossible to suppose that it was ever intended by the parties that the liability of the lessees to pay damages for the breaches of covenant already committed by them should be put an end to by mere determination of the lease. I think the point is sufficiently decided against such a contention by the decision in *Hartshorne* v. *Watson*. (1) There Tindal C.J. said: "The argument" (that the covenant to pay rent was gone) "would equally apply to covenant for repairs, or other services to be rendered by the lessee, and is so unreasonable that it cannot be upheld." There must be judgment for the plaintiff.

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(1) (1838) 4 Bing. N. C. 178; 44 R. R. 693.

Judgment for the plaintiff.

Solicitors for plaintiff: *Child & Child.*
Solicitor for defendants: *A. J. Adams.*

J. F. C.

1903
Jan. 19.

DUNN *v.* SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

County Court—Practice—Payment into Court with Denial of Liability—Costs—Discretion of Judge over Costs of specific Issues.

The plaintiff having brought an action in the county court for personal injuries caused by the defendants' negligence, the defendants paid money into court with a denial of liability. A trial was had, but on appeal the Divisional Court ordered a new trial, with costs of the first trial to abide the event. On the second trial the plaintiff recovered a verdict, but for no more than the amount paid into court:—

Held, that, though the defendants were entitled to the general costs of the action, the county court judge had a discretion to give the plaintiff his costs of the issue of negligence on which he had succeeded, and that that discretion was not taken away by the order of the Court that the costs should abide the event.

APPEAL from Southwark County Court.

The action was for personal injuries caused by the defendants' negligence. The defendants paid 25*l.* into court with a denial of liability. At the trial the county court judge withdrew the case from the jury. Upon appeal the Divisional Court made an order for a new trial, the costs of the first trial to abide the event. On the second trial the jury returned a verdict for the plaintiff for 25*l.* The county court judge, thinking that he was bound by the decision in *Wood* v. *Leetham* (1) to hold that he had no discretion to give the plaintiff the costs of the issue of liability on which he had succeeded, directed judgment to be entered simply for the defendants with costs to be taxed. At the same time he intimated that if he had had any discretion in the matter he would have given the plaintiff the costs of that particular issue. The plaintiff appealed.

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(1) 4 Bing. N. C. 178; 44 R. R. 693.

Woodfin, for the plaintiff. By s. 113 of the County Courts Act, 1888, the judge is given a general discretion over the costs. It is true that that discretion does not enable him to make a successful defendant pay the general costs of the action: *Andrew* v. *Grove* (2); but it does enable him to make him pay the costs of a specific issue upon which he has failed. The practice of the county court in this respect is bound to follow that of the High Court, and in *Wagstaffe* v. *Bentley* (3) it was conceded by the Court of Appeal that, in such a case as the present, if the action were in the High Court the judge would have discretion to give the plaintiff the costs of the issue of negligence. In *Wood* v. *Leetham* (1) the question was whether, the plaintiff having recovered less than the amount paid into court, the judge was entitled to direct that each party should pay his own costs; the distinction between the general costs of the action and the costs of specific issues was not present to the minds of the Court, for the question did not there arise.

Frank Mellor, for the defendants. The rule of practice in the High Court that, where the defendant pays money into court with a denial of liability and the plaintiff recovers less than the amount paid in, the defendant may be ordered to pay the costs of the issue of liability depends upon the fact that in the High Court there are pleadings upon which distinct issues are raised. In the county court, however, there are no pleadings, and there is only one issue. The rule as to the judge's discretion is consequently different in the county court.

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(1) (1892) 61 L. J. (Q.B.) 215.
(2) [1902] 1 K. B. 625.
(3) [1902] 1 K. B. 124.

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Lord Alverstone C.J. I think this is a case of some importance. If it is contended that a judge in the county court has not the same discretion over costs as a judge in the High Court, I think that contention is sufficiently answered by s. 113 of the County Courts Act, 1888, which provides that "all the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just." Moreover, it is enacted by s. 164 of the County Courts Act that, in any case not expressly provided for by the Act or the rules made under it, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters in the county court. Then, with reference to the payment of money into court with a denial of liability in the High Court, it has been decided in *Wheeler* v. *United Telephone Co.* (1), and a number of other cases, that, where the plaintiff recovers no more than the amount paid in, the defendant is entitled to the general costs of the action. But, with respect to the issues decided in the plaintiff's favour, the judge in the High Court has a discretion over the costs of those issues. The decision of the Court of Appeal in *Wagstaffe* v. *Bentley* (2) proceeds upon the assumption that this is so. It would be very unjust if the rule were otherwise, for there would then be no distinction in this respect between payment into court with and payment into court without a denial of liability, and in the former case the plaintiff would be put to the expense of proving liability without the chance of getting any of the costs of that issue if he failed on the question of damages. This, then, is a rule of practice which ought to be adopted equally by the county court. In the present case the county court judge intimated that if the matter had been open and he had had a discretion he would have exercised it in favour of giving the plaintiff his costs of the issue on which he succeeded. Therefore, it is unnecessary for us to remit the case to him, and we must make the order that the plaintiff have his costs accordingly. The only other question is whether we are precluded from making such an order by reason of our having made it a term of the order for a new trial that the costs should abide the event. I think not. We did not mean to exclude the discretion of the judge. And I think that the exercise of his discretion in respect of the costs of the issue upon which the plaintiff succeeded was as much a part of the event as the success of the defendants on the question of damages.

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(1) (1884) 13 Q. B. D. 597.

(2) [1902] 1 K. B. 124.

WILLS J. I am of the same opinion.

CHANNELL J. I agree. I think we are entitled to make the order; we are doing what the judge said he would have done if he had thought that he had the power. With respect to the argument for the defendants that as there are no pleadings in a county court there are, strictly speaking, no separate issues, I think that fact is immaterial. The case of *Forster* v. *Farquhar* (1) shews that, in order to give the Court discretion over the costs of particular items of proof, it is not necessary that those items should create separate issues in the pleader's sense.

Appeal allowed.

Solicitor for plaintiff: *W. H. Curtis.*
Solicitor for defendants: *J. W. Watkin.*

J. F. C.

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(1) [1893] 1 Q. B. 564.

C. A.
1903
Feb. 4.

[IN THE COURT OF APPEAL.]

McIVER & CO., LIMITED *v.* TATE STEAMERS, LIMITED.

Ship—Charterparty—Warranty of Seaworthiness—Supply of Coal for Steamer—Provision that Charterers should provide Coal.

Where it was provided by the terms of a charterparty, by which a steamer was chartered for a round voyage from Liverpool to the River Plate and back to the United Kingdom, that the charterers should provide and pay for all the coal:—

Held, that this provision did not relieve the shipowners from the obligation of seeing that the ship was in a seaworthy condition in respect of her supply of coal at the commencement of each of the stages of the voyage.

Appeal from the judgment of Kennedy J. in an action tried by him without a jury.

The action was by charterers against shipowners for damages for breach of the contract contained in a charterparty by reason of the vessel chartered not being seaworthy for a voyage from the River Plate to St. Vincent. By the charterparty the defendants agreed to let and the plaintiffs agreed to hire a steamer called the *Patapsco* for one round voyage from Liverpool to the River Plate and back to the United Kingdom, the vessel "to be placed at the disposal of the charterers at Liverpool in such dock, or at such wharf or place (where she may always safely lie afloat) as they may direct, and being on her delivery ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service, ... and to be so maintained during the continuance of this charterparty; to be employed in carrying lawful merchandise . . . . as the charterers or their agents shall direct on the following conditions: namely (among others), 1, that the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew, and shall pay for the insurance of the vessel, and also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service: 2, that the charterers shall provide and pay for all the coal, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers, or crew), and all other charges whatsoever except those before stated: 3, that the charterers shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on the expiration of this charterparty, pay for all coal left in the bunkers, each at the current market prices of the respective ports where she is delivered to them: . . . . 8, that the whole reach of the vessel's holds, decks and usual places of loading and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel, including cattle $\frac{\text{and}}{\text{or}}$ coal $\frac{\text{and}}{\text{or}}$ cargo on deck at shipper's risk: 9, that the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with the ship's crew, tackle and boats, and that, though appointed by the owners, he shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain's signing bills of lading or otherwise complying with the same: 10, that, if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments: . . . . 12, that the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are to be patent to the charterers or their agents, and furnish to the charterers, their agent or supercargo, when required, a true daily copy of the log, shewing the course of the steamer and distance run and the consumption of coal: . . . . 17. The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam

C. A.
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McIver & Co., Limited v. Tate Steamers, Limited.

navigation, and errors of navigation, throughout this charterparty, always mutually excepted."

It appeared that there was not in the ship's bunkers, when she started on the stage of the return voyage from the River Plate to St. Vincent, a sufficient quantity of coal, having regard to the ordinary incidents of navigation on that voyage at the time of year, and the ship was therefore unseaworthy for the purpose of the voyage. This deficiency of coal appeared to have arisen, not from any failure of the charterers to supply coal required by the captain, but from failure on the part of the chief engineer to estimate correctly the quantity of coal in the ship's bunkers when she started. In consequence of the insufficiency of coal on board the ship she had to deviate and put into Pernambuco to procure a supply of coal; and the voyage was thereby delayed and the plaintiffs had to pay a higher price for the coal than if it had been procured in the River Plate. The plaintiffs had a supercargo on board the ship.

The learned judge gave judgment for the plaintiffs on the ground that the provisions of the charterparty did not relieve the defendants from the obligation to see that the ship was seaworthy in respect of her supply of coal for the different stages of the voyage contemplated by the charterparty, and that she was not seaworthy for the voyage from the River Plate to St. Vincent by reason of the insufficiency of her supply of coal for that voyage.

J. A. Hamilton, K.C., and *Bailhache*, for the defendants. By the terms of the charterparty the charterers are to provide as well as pay for all the coal; and therefore the quantity of coal to be shipped, and the place and time of its shipment, are in their discretion. At a place where they have no agent, no doubt the captain might have to exercise that discretion, but he would exercise it as the agent of the charterers, and not of the shipowners; and, if he be negligent in that respect, it will not constitute a breach of the obligation of the shipowners as to the seaworthiness of the ship. Having regard to the terms of the charterparty as to coal, there was no warranty on the part of the shipowners that the ship should be seaworthy so far as the supply of coal was concerned. The question who would be liable on bills of lading to owners of cargo for the seaworthiness of the ship with regard to her supply of coal has no necessary connection with the question as to the liability as between the shipowners and charterers. There is nothing to prevent them from apportioning the obligation of providing the different matters necessary for the seaworthiness of the ship between themselves in any way they choose by the terms of the charterparty.

[They cited *The Vortigern*. (1)]

Pickford, K.C., and *Bateson*, for the plaintiffs, were not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Kennedy J. was right. The argument for the defendants in substance is that the terms of the charterparty relieve the shipowners from the obligation to see that the ship is seaworthy in respect of the quantity of coal on board when she first starts, and at each successive stage of the round voyage. The clause of the charterparty principally relied on for this purpose was clause 2, which is to the effect that the charterers are to provide and pay for the necessary coal. It was contended that the use of the word "provide," as well as the words "pay for," indicated the intention of the parties to be that it should be a matter for the charterers' discretion how much coal was required for the vessel before starting on each stage of the voyage, and that to that extent the shipowners should be relieved of the obligation of seeing that the ship was seaworthy. I cannot agree with that contention. I cannot see anything in the terms of the charterparty to relieve the shipowners from the obligation that would ordinarily be imposed upon them in this respect. It was said that, the plaintiffs having agreed to provide the coal necessary for the voyage, they could not sue for damages because they themselves had provided an insufficient amount of coal. Assuming that the plaintiffs exercised any discretion as to the quantity of coal to be provided, of which I see no evidence, it appears to me that they were placed in a position in which it was impossible for them to form a correct judgment as to the amount of coal to be provided through the default of the defendants' servants. Under the circumstances I see no reason for thinking that the judgment of Kennedy J. was wrong in any respect, and I think the appeal must be dismissed.

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(1) [1899] P. 140.

Stirling L.J. concurred.

Mathew L.J. I agree. It is not disputed that the obligation of the shipowners to see that the ship was seaworthy was not, in terms, got rid of by this charterparty, and that the charterers in the ordinary course would be entitled to have a seaworthy ship provided by the shipowners. The argument is that, as to everything but the supply of coal, the obligation still remained on the shipowners, but as to that it was imposed on the charterers. It is only necessary, I think, to read the charterparty to see that this could not have been the intention of the parties. Having regard to the obligation, which, in my opinion, remained imposed on the shipowners, of having the ship in a seaworthy condition in respect of her supply of coal at the commencement of the different stages of the voyage, it was the duty of the captain to give the charterers correct information, to enable them to provide the requisite quantity of coal. That duty was not performed, and therefore enough coal was not provided before the ship left the River Plate. The vessel in consequence was unseaworthy for the voyage from the River Plate to St. Vincent, and the loss was thereby occasioned to the plaintiffs, in respect of which the learned judge has given them damages. In my opinion his judgment was correct.

Appeal dismissed.

Solicitors for plaintiffs: *Charles Russell & Co., for Lightbound, Owen & Co., Liverpool.*

Solicitors for defendants: *Downing & Bolam, for Bolam & Co., Sunderland.*

E. L.

GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY, LIMITED.

1902
Dec. 1, 2, 10.

Insurance, Marine—Round Voyage by Stages—Warranty of Seaworthiness, Breach of—Steamship insufficiently provided with Coal—Burning Ship's Fittings and Cargo—Negligence of Master—"Held Covered" Clause in Policy—Fixing Amount of Premium after Breach of Warranty.

The plaintiffs insured their steamship with the defendants for a round voyage from the United Kingdom to port or ports on the West Coast of South Africa and back again, with leave to call at any ports or places on the east coast of South America, &c. The insurance included general average. The perils insured against were of the seas, &c., subject to clauses annexed to the policy which provided (inter alia): "This insurance also to cover loss through the negligence of the master," &c., and "Held covered in case of any breach of warranty, &c., at a premium to be hereafter arranged." During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. Her coal supply failing between Monte Video and St. Vincent, the master burnt as fuel some of the ship's fittings, spars, and some of the cargo, and if he had not done so she would have been in danger of becoming a total loss. The plaintiffs did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient coal, and no premium had been arranged under the "held covered" clause. In an action on the policy to recover in respect of the loss of the fittings, spars, and cargo:—

Held, that an implied warranty of seaworthiness existed when the ship left Monte Video, and that there was a breach of that warranty in not there providing her with sufficient coal; so that the policy then ceased to attach to the risks insured against:

Also, that the clause with respect to loss through the negligence of the master did not apply, because his negligence was not the proximate cause of the loss;

And that the implied warranty of seaworthiness was a warranty to which the "held covered" clause applied; but that, as the premium which the defendants might reasonably have charged if they had known of the breach of warranty before the loss occurred was at least equal to the amount of the loss, the plaintiffs were not entitled to recover anything.

COMMERCIAL CAUSE, tried before Bigham J.

Action on a policy of marine insurance effected by the plaintiffs with the defendants on the plaintiffs' steamship *Gulf of Florida.*

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The facts were agreed as follows:—

The policy was dated July 19, 1897, and contained the following terms:—

"For 3000*l.* on the *Gulf of Florida*, valued at 30,000*l.*, at and from   to port or ports in any order in the United Kingdom $\frac{\text{and}}{\text{or}}$ Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports, place or places, on West Coast of South Africa backwards and forwards and forwards and backwards in any order or rotation, while there and thence to port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in any order in the United Kingdom $\frac{\text{and}}{\text{or}}$ Continent between Bordeaux and Hamburg, both inclusive, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage, whichever may first occur. With leave to call at any ports and places for all purposes, and any ports and places on the east coast of South America $\frac{\text{and}}{\text{or}}$ Falkland Islands, both outwards and homewards. The risk not to commence before the expiration of previous policies. Against the risk of total loss only, but including collision clause, general average, and salvage charges. Perils insured against of the seas, &c. Subject to and including Gulf Line Voyage Clauses as annexed."

The clauses annexed were, so far as material, as follows:—

"This insurance also to cover loss through the negligence of the master, mariners, engineers, or pilots, including all risks incidental to steam navigation. General average, salvage, and special charges payable as per official foreign adjustment, if so made up, or per York-Antwerp Rules, 1890, if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, $\frac{\text{and}}{\text{or}}$ any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged. It shall be lawful to the assured, their factors, servants, and assigns to sue, labour and travel for, in, and about the defence, safeguard, and recovery of the said ship, &c., and any part thereof, without prejudice to this insurance, to the charges whereof we, the assurers, will contribute each according to the rate or quantity of this sum herein assured. In the event of any inaccuracy in the description of voyage, interest, name of vessel, clauses, or conditions, it is agreed to hold the assured covered at a premium to be arranged."

The previous policies, before the expiration of which the risk was not to commence, were all in similar terms. One of them is dated January 1, 1897, and is subscribed by the defendants.

The events giving rise to the disputes between the parties took place after the *Gulf of Florida* left Monte Video on December 18, 1897. Stated shortly, they were as follows: On arrival at Monte Video the *Gulf of Florida* had on board 232 tons of bunker coals. She took on board a further 330 tons, and sailed on December 18 with 562 tons in the bunkers, the bunkers being full, and the quantity apparently more than sufficient for the passage to St. Vincent, where in the ordinary course she would coal again. On the same day that she left Monte Video she put back in consequence of an accident to the condenser door. This was renewed, and the voyage resumed on December 23. By this time about twenty tons of the bunker coals had been used, but those on board considered she had still sufficient for the passage to St. Vincent. After leaving Monte Video the *Gulf of Florida* experienced strong head-winds and seas. On January 7, 1898, the coal was found to be burning very quickly, at a rate equal to thirty-six tons per day. As the rate of consumption continued very high, the speed was reduced on January 9, and to save steam the steam steering-gear and electric light were shut off. On January 10 some of the ship's fittings were used for fuel, and on subsequent days further fittings and spars and portions of the cargo were burnt to assist in keeping up steam. If this had not been done, the *Gulf of Florida* would have been unable to reach port without assistance, and without such assistance would have been helpless and in danger of being totally lost. The quantity of coal with which the *Gulf of Florida* left Monte Video, both on December 18 and 23, was in fact insufficient for the passage to St. Vincent. This insufficiency happened owing to the negligence of the master and engineers. The value of the ship's fittings and spars burnt was 312*l*. 4*s*. The plaintiffs have paid the consignees of cargo for the cargo used as fuel 662*l*. 1*s*. 11*d*.

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The plaintiffs claim that they are entitled to the defendant company's proportion of the value of the ship's fittings and spars burnt, and of the sums paid for cargo burnt. Alternatively, they claim the defendant company's proportion of the value of the fittings and spars burnt, and of the ship's contribution in general average of the value of the cargo burnt. In further alternative, the plaintiffs claim to be entitled as above on payment of an additional premium to be fixed by the Court, or as the Court may direct.

The defendants deny that the plaintiffs are entitled to any of the said sums, or any part thereof, even on payment of an additional premium.

Carver, K.C., and *Leck*, for the plaintiffs. The plaintiffs are entitled to recover the defendants' proportion of the value of the ship's fittings, which were burnt, as for a general average loss. As to the cargo burnt, the plaintiffs have to pay a contribution as general average to the cargo owners, and are entitled to recover that contribution from the defendants. This was an extraordinary sacrifice made for the safety of the whole adventure, and it is the subject of general average: *The Bona* (1); *Strang, Steel & Co.* v. *A. Scott & Co.* (2); *Montgomery* v. *Indemnity Mutual Marine Assurance Co., Ld.* (3) Assuming that this was a voyage policy, and there was a warranty of seaworthiness, that warranty was only in respect of the condition of the ship at the commencement of the voyage, and therefore was not in force when the loss occurred: *Gibson* v. *Small* (4); *Bermon* v. *Woodbridge* (5), per Lord Mansfield C.J. The loss can also be recovered under the "sue and labour" clause in the policy. What was done was equivalent to buying goods to burn for the safety of the ship, and it comes to the same thing if the goods of others are burnt for which the shipowners are liable to pay. The distinction between general average and "sue and labour" expenses is not absolute; there may be a loss which is the subject of general average, and is also recoverable under the "sue and labour" clause.

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(1) [1895] P. 125.

(2) (1889) 14 App. Cas. 601.

(3) [1901] 1 Q. B. 147; [1902] 1 K. B. 734.

(4) (1852) 4 H. L. C. 353.

(5) (1781) 2 Doug. 781, at p. 788.

Hamilton, K.C., and *Simey*, for the defendants. This was clearly, having regard to the terms of the policy and the attached clauses, a voyage policy for a voyage by stages, and there was an implied warranty that the vessel was seaworthy at the commencement of each stage: *The Vortigern* (1), in which the decision in *Thin* v. *Richards* (2) was followed. The plaintiffs are not entitled to recover under the clause covering loss through the negligence of the master, &c. In a policy of marine insurance the loss must be proximately caused by the perils insured against: *Wilson, Sons & Co.* v. *Owners of Cargo per The Xantho* (3), per Lord Herschell; *Hamilton, Fraser & Co.* v. *Pandorf* (4); *Ionides* v. *Universal Marine Insurance Co.* (5); *Pink* v. *Fleming*. (6) Here the loss was proximately caused by the burning; it was not a necessary consequence of the captain's negligence in not taking in sufficient coal at Monte Video that the ship's fittings and cargo were burnt; his negligence was "causa sine qua non," but not "causa proxima." The "held covered" clause does not apply. It applies only to a breach of warranty ascertained before the loss has occurred. There can be no arrangement or agreement as to the premium after the loss has occurred and is known to insurers and insured. The burning of the ship's fittings and the cargo was not a sacrifice which could be the subject of general average at all. It was not a sacrifice caused by perils of the seas. The shipowner is bound to provide fuel to get the ship along; and, if he does not provide sufficient fuel and the master elects to burn spars and cargo, the sacrifice is caused by inherent defect in the condition of the ship, and does give rise to a claim for general average contribution: *Fawcus* v. *Sarsfield* (7); *Wilson* v. *Bank of Victoria* (8), per Blackburn J.; *Robinson* v. *Price* (9), per Lush J.; *Ballantyne* v. *Mackinnon*. (10) The "sue and labour"

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(1) [1899] P. 140.

(2) [1892] 2 Q. B. 141.

(3) (1887) 12 App. Cas. 503, at pp. 509, 510.

(4) (1887) 12 App. Cas. 518.

(5) (1863) 14 C. B. (N.S.) 259.

(6) (1890) 25 Q. B. D. 396.

(7) (1856) 6 E. & B. 192.

(8) (1867) L. R. 2 Q. B. 203, at p. 212.

(9) (1876) 2 Q. B. D. 91, at p. 95.

(10) [1896] 2 Q. B. 455.

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clause does not apply where the suing and labouring is, as it was here, in order to avert a peril. The master in burning the fittings and cargo was only trying to remedy the consequences of his own negligence.

[They also referred to *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1), judgment of Lord Penzance; *Hyderabad (Deccan) Co.* v. *Willoughby.* (2)]

Carver, K.C., in reply, cited *Harrison* v. *Bank of Australasia* (3); *Aitchison* v. *Lohre* (4); *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (5); *Dixon* v. *Sadler.* (6)

Cur. adv. vult.

1902. Dec. 10. BIGHAM J. read the following judgment:—The main question in this case is whether, when the *Gulf of Florida* sailed from Monte Video for St. Vincent on December 23, 1897, there existed any implied warranty on the part of the plaintiffs that she was seaworthy for that voyage. It is found as a fact that she was insufficiently coaled, and this was clearly a breach of the warranty, if such a warranty existed. Now, the policy sued upon is a voyage policy; the body of the policy and the attached clauses clearly shew it; so that, when the vessel originally started from the United Kingdom on her round, a warranty existed that she was seaworthy for that round voyage. But the warranty is one thing and the observance of it another. It is clear that in such an adventure it is practically impossible for the ship to sail with sufficient coal for the whole of the contemplated voyage. She would have to call at convenient ports on her route for the purpose of replenishing her bunkers, and therefore, though the warranty at starting is that she shall be seaworthy for the whole voyage, the warranty is sufficiently observed if the voyage is so arranged as that the ship can and shall coal at convenient ports en route. The warranty may be stated as an undertaking that the vessel shall be sufficiently coaled for the whole of her voyage, the warranty to be observed by coaling sufficiently at successive points to navigate the vessel to the end of her voyage. This, I think, is the true effect of *Thin* v. *Richards* (1) and of *The Vortigern.* (2) There is, to use the language of the present Master of the Rolls, "a recurring obligation to bring the vessel up to the required standard at each stage." It is true that in both those cases the question arose between shipowner and cargo owner, and not between shipowner and underwriter. But this, in my opinion, makes no difference, and I am fortified in this view by the judgment of the late Sir A. L. Smith M.R. in *The Vortigern* (3): "In my judgment, when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness, which primâ facie has been established against him. In each case it is a matter of proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established." This view of the law does not in any way conflict with the well-known rule that, once the warranty of seaworthiness for the whole voyage is complied with, the shipowner's obligation to the underwriter is at an end. It merely allows of a convenient way of enabling the shipowner to fulfil his warranty—that is to say, to fulfil it by stages instead of once for all at the beginning of the risk. I therefore hold that the warranty of seaworthiness still existed at Monte Video, and was there broken. The result is that when the vessel sailed from Monte Video the policy no longer attached to the risks insured against. But there are other questions to consider. It is said that the breach was due to the negligence of the master and engineers, and that therefore the loss is covered by the negligence clause attached to the policy. This clause is one of a number of clauses introduced into the policy by the shipowners for their own benefit. It is in the following words: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. . . ." I do not think this clause has any application to the present case. The underwriters are only responsible for losses which are directly attributable to the risks insured against. The loss in question—namely, the burning of the ship's fittings and spars—was not directly due to any negligent act at all. It was due to the voluntary act of those engaged in the navigation of the ship. The original negligence was no doubt causa sine qua non, but it was not causa causans. Therefore it cannot be taken into consideration. Moreover, as I have before stated, the loss did not happen until after the policy had ceased to attach. The plaintiffs, however, relied upon another of the appended clauses as affording them a right to recover. The consideration of this clause presents more difficulty. It is as follows: "Held covered in case of any breach of warranty, deviation $\frac{\text{and}}{\text{or}}$ any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged." Now, undoubtedly the warranty of seaworthiness is far and away the most important of the few implied warranties which a shipowner enters into when he insures his ship, and I am satisfied that if proper effect is to be given to this clause it must be held to apply to that particular warranty. What, then, is the operation of the clause? In my opinion, it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriter to hold him covered. It also entitles the underwriter to exact a new premium commensurate with the added risk. But what is to happen if the breach is not discovered until a loss has occurred? I think even in that case the clause still holds good, and the only open question would be, what is a reasonable premium for the added risk? To answer this the parties must assume that the breach was known to them at the time it happened, and must ascertain what premium it would then have been reasonable to charge. If they cannot do it by agreement, they must have recourse to a Court of law. It is like the case of goods sold at a reasonable, though an unnamed, price. The sale is good, but the price has to be ascertained, either by agreement or at law. In the present case the parties ask the Court to fix this additional premium, and I am prepared to do it. What might an underwriter fairly require as a premium for insuring a steamer which starts on a voyage short of coal? One of the almost inevitable consequences of such a state of things is that some other fuel will have to be used during the voyage—cargo, or ship's fittings, or spars. Such a sacrifice will constitute a general average loss, for which the underwriter will be responsible to the shipowner. Would it be reasonable to require the underwriter to charge as premium a less sum than the amount of a loss so obviously probable? I think not, and indeed I think the underwriter would reasonably be entitled to charge more, for the short supply of coal would not merely bring about the general average loss I have mentioned (as it did in this very case), but would also materially increase the risk of a total loss of the vessel herself. Thus I come to the conclusion that the additional premium in this case ought to be at least equivalent to the average loss now claimed. It follows that the plaintiffs can recover nothing in this action, for the additional premium more than meets the loss claimed. A question was argued before me as to whether the loss in question was a general average loss, or gave rise to a larger claim on the part of the shipowner under the sue and labour clause. It is not material to consider this question, for, even if the full value of the burnt goods could be recovered under the sue and labour clause, I should still be of opinion that the additional premium would exceed the amount of the claim; but I desire to say that, in my opinion, the sacrifice cannot be regarded as

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(1) (1870) L. R. 3 P. C. 234, at p. 243.

(2) [1899] 2 Q. B. 530.

(3) (1872) L. R. 7 Ex. 39.

(4) (1879) 4 App. Cas. 755.

(5) (1887) 12 App. Cas. 484.

(6) (1839) 5 M. & W. 405.

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(1) [1892] 2 Q. B. 141.

(2) [1899] P. 140.

(3) [1899] P. 140, at p. 155.

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within the sue and labour clause. At most it is the subject-matter of general average.

Judgment for defendants.

Solicitors for plaintiffs: *Coote & Ball, for Adamson & Adamson, North Shields.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

W. A.

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Dec. 12, 15.
1903
Jan. 12.

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Marine Insurance—Reinsurance—Constructive Total Loss—"To pay as may be paid thereon"—Suing and Labouring—Salvage Charges.

Shipowners insured their ship with the plaintiffs for a voyage against partial as well as total loss, the sound value of the ship being expressed in the policy to be agreed at a specified sum. The plaintiffs reinsured with the defendant against the risk of total or constructive total loss only, the ship being valued as per original policy. The policy of reinsurance was in the form of an ordinary Lloyd's policy, containing in print the usual undertaking by the assurers to contribute to suing and labouring charges. It also contained in writing the following clauses: "Being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; and, "No claim to attach to this policy for salvage charges." During the course of the insured voyage the ship stranded and suffered damage. The probable cost of getting her afloat, taking her to a port of repair, and repairing her exceeded the agreed value of the ship as expressed in the policy, but as it was in fact less than her real repaired value the owners elected not to give notice of abandonment. The ship was floated and placed in a condition of safety, and subsequently taken to a port of repair and repaired. The owners recovered from the plaintiffs upon their policy 107*l.* per cent. of their proportion of the agreed value of the ship, that sum being made up partly of the expense of repairs and partly of the expense of floating her. The plaintiffs then sued the defendant for the full amount underwritten by him as in respect of a constructive total loss, or in the alternative for his proportion of the suing and labouring charges:—

Held, (1.) that, there being, in the absence of a notice of abandonment by the owners, no original liability upon the plaintiffs to pay as for a constructive total loss, the mere fact that they had paid, in respect of a partial loss and suing and labouring charges combined, upwards of 100*l.* per cent. did not entitle the plaintiffs to recover that sum from the

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defendant as for a constructive total loss under the words "to pay as may be paid thereon"; and (2.) that the clause providing that no claim was to attach for "salvage charges" excluded the defendant's obligation to contribute to the suing and labouring charges, notwithstanding the omission to delete the printed clause imposing that obligation.

Uzielli v. *Boston Marine Insurance Co.*, (1884) 15 Q. B. D. 11, discussed.

TRIAL before Bigham J. without a jury.

The owners of the ship *Edmund* by a policy dated November 21, 1900, insured her with the plaintiffs for a voyage from Santa Rosalia to Portland (Oregon). By the terms of the policy, which was against partial as well as total loss, the sound value of the ship was agreed at 19,000*l.* By a policy of reinsurance dated December 11, 1900, the plaintiffs reinsured themselves with the defendant (amongst other underwriters) "against the risk of total $\frac{\text{and}}{\text{or}}$ constructive total loss only," the ship being expressed therein to be "valued as per original policy." The policy, which was in the ordinary Lloyd's form, contained in print the usual suing and labouring clause. The policy also contained in writing the following clauses: "Including valuation clause if in original policy"; "Being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; and, "No claim to attach to this policy for salvage charges." The *Edmund* sailed from Santa Rosalia in ballast on November 28 for Portland, and within a few hours after sailing she stranded. The owners did not then nor at any time give notice of abandonment. The London Salvage Association, acting in the interests of the plaintiffs and other underwriters on original policies, succeeded, after the ship had been aground for some weeks, in floating her on January 16, 1901, and bringing her back to Santa Rosalia. Temporary repairs were done, and she started in tow for San Francisco as the nearest port where permanent repairs could be done. On her way she met with rough weather and had to put into San Diego, where further repairs were done, and on February 20 she arrived at San Francisco, where she was permanently repaired. The total cost of floating the ship and taking her to San Francisco and repairing her amounted to 20,207*l.* But the real repaired value of the ship in fact exceeded that sum, although it was agreed in the policies at the lower figure of 19,000*l*. The plaintiffs paid to the owners 107*l*. per cent. upon the original policy, which included the cost of floating the ship as well as that of the repairs. The present action was brought to recover from the defendant as in respect of a constructive total loss the sum of 100*l*., which was the amount for which the policy of reinsurance was subscribed by him, or in the alternative the sum of 39*l*. 5*s*., as being his proportion of the cost of floating the ship.

Evidence was given by underwriters called on behalf of the defendant to the effect that for many years past the words "no salvage charges" in a policy of reinsurance were understood to include suing and labouring charges as well as volunteer salvage services. Evidence was also given that in another policy, made out by other underwriters from the very same slip as that from which the policy sued on was made out, the suing and labouring clause was struck out of the printed form.

Hamilton, K.C., and *Loehnis*, for the plaintiffs. The ship here was in fact a total loss, and if the owners had given notice of abandonment there is no question but that the plaintiffs would have been liable to pay as for a total loss, and could have similarly recovered over against the defendant. But, having regard to the fact that the plaintiffs were liable to pay upwards of 100 per cent. of the agreed value of the ship, and paid that amount, the absence of a notice of abandonment cannot affect their right to recover from the defendant, the contract of reinsurance having provided that the defendant is "to pay as may be paid thereon." So long as there is a liability to pay 100 per cent. under the original policy, and the money is paid, that is enough to support a claim for a total loss under the reinsurance policy. It matters not under what head of claim the reinsurers were liable to pay the 100 per cent. The important point is the percentage. To hold otherwise would be to introduce a wagering element into the policy of reinsurance; for whereas the reinsurers would have to pay the same amount whether the owners chose to claim as for a partial or as for a total loss, the reinsurers' right to recover over would depend upon whether the owners elected to claim under the one head or under the other. In *Chippendale* v. *Holt* (1) underwriters, having insured a ship, reinsured themselves with the plaintiffs, who reinsured themselves with the defendants. The ship stranded, and the owner claimed for a constructive total loss, which the underwriters paid, and were paid in their turn by the plaintiffs. The defendants, however, refused to admit that the ship was in fact a constructive total loss, and it was held by Mathew J. that the words in the defendants' policy of reinsurance "to pay as may be paid thereon" did not relieve the plaintiffs from the necessity of proving that they were liable to pay as well as that they had in fact paid, for that otherwise the contract would be a wager. That case is in the plaintiffs' favour. The question is practically covered by the decision in *Uzielli* v. *Boston Marine Insurance Co.* (2) There the owners of a ship insured her with underwriters, who reinsured themselves with the plaintiffs, who in turn reinsured themselves with the defendants. The defendants' policy bound them to pay as might be paid thereon, was to cover risk of total loss only, and contained a suing and labouring clause. The ship went ashore, and the owners gave notice of abandonment to their underwriters, who settled the owners' claim for a constructive total loss at 88 per cent. The underwriters spent a large sum in floating the ship, which sum, after deducting the price for which the ship was ultimately sold, amounted to 24 per cent. It was held by the Court of Appeal that the plaintiffs could not recover the 24 per cent. under the suing and labouring clause on the ground that the original underwriters were not the factors, servants, or assigns of the plaintiffs within the meaning of the suing and labouring clause; but the plaintiffs were held entitled to recover 100 per cent., or 12 per cent. more than the amount at which the total loss had been settled, and this 12 per cent. they were allowed to recover under the words "to pay as may be paid thereon." Lindley L.J. said: "If it were not for the clause whereby the defendants were rendered subject to the same

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(1) (1895) 1 Com. Cas. 197; 65 L. J. (Q.B.) 104.

(2) 15 Q. B. D. 11.

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terms, clauses, and conditions as were contained in the original policy, and were to pay as might be paid thereon, the plaintiffs, in my opinion, if indeed they could recover at all, would be entitled to recover only 88 per cent."

Secondly, the plaintiffs are in the alternative entitled to recover in respect of the suing and labouring charges. Their right to do so is not excluded by the clause providing that no claim is to attach for "salvage charges." In this policy the two terms are meant to cover different things. Here salvage charges should be read as applying only to volunteer salvage charges, for the Court is bound if possible to give effect to every part of the contract. If the parties intended to delete the suing and labouring clause they ought to have struck it out.

Scrutton, K.C., and *Mackinnon*, for the defendant. The plaintiffs cannot sue as for a constructive total loss, for they were never liable to pay such a loss. Their only interest in the ship is their liability under their policy. They cannot recover under the words "to pay as may be paid thereon," for that means properly pay—pay under a liability to pay: *Chippendale* v. *Holt* (1); *Marten* v. *Steamship Owners' Underwriting Association.* (2) The true explanation of *Uzielli* v. *Boston Marine Insurance Co.* (3) is that given in the 7th edition of Arnould's Marine Insurance, s. 866, that the 12 per cent. allowed for salvage expenses was recoverable only as losses due to perils of the sea.

Secondly, the plaintiffs' claim for 39*l.* 5*s.* under the suing and labouring clause is negatived by the clause as to no salvage charges. Charges incurred in saving a vessel from peril are properly described as salvage charges. The evidence of the underwriters called to support the defendant's contention that salvage charges in this contract include suing and labouring expenses was uncontradicted. The objection that that construction gives no effect to the suing and labouring clause is immaterial. Policies of marine insurance cannot be read with the same strictness as other written contracts: see per Walton J. in *Cunard Steamship Co.* v. *Marten* (1), where he observes, with reference to marine policies, that in practice it is most unusual to find that the superfluous or inapplicable words have been struck out of the printed form. In this case the suing and labouring clause was inapplicable, for this is a reinsurance policy, and what is insured in a reinsurance policy is the liability under the original policy, and to a contract of indemnity against a liability to a limited amount the suing and labouring clause can have no application: *Cunard Steamship Co.* v. *Marten.* (1) If the term "salvage charges" means what the plaintiffs contend, then on this policy it was superfluous to exclude it, for in *Aitchison* v. *Lohre.* (2) Lord Blackburn, speaking of volunteer salvage claims, said: "The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril." That would here be a partial loss, and could not be recovered under a policy against total loss only.

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(1) 1 Com. Cas. 197; 65 L. J. (Q.B.) 104.

(2) (1902) 7 Com. Cas. 195.

(3) 15 Q. B. D. 11.

Hamilton, K.C., in reply.

Cur. adv. vult.

Jan. 12. BIGHAM J. This is an action brought on a policy of reinsurance dated December 11, 1900, and expressed to be for 1800*l.* upon the ship *Edmund*, valued as per original policy, from Santa Rosalia to Portland (Oregon) and thence to the United Kingdom. It is subscribed by the defendant for 100*l.* The policy is in the ordinary Lloyd's form; but written on its face are four special clauses, which are in the following terms: 1. "Including valuation clause if in original policy"; 2. "Being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; 3. "Being against the risk of total $\frac{\text{and}}{\text{or}}$ constructive total loss only"; and 4. "No claim to attach to this policy for salvage charges."

The original policy dated November 21, 1900, was issued by the plaintiffs to the shipowners, the ship being valued therein at 19,000*l.* This policy was also in the usual Lloyd's form; but it covered partial loss as well as total loss. Attached to and incorporated with it was a clause to the effect that general average and salvage charges should be payable according to foreign statement if so claimed, and a further clause that the value of 19,000*l.* should be mutually admitted and taken to be the sound value of the ship for all purposes of constructive total loss under the policy.

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(1) [1902] 2 K. B. 624.

(2) (1879) 4 App. Cas. 755.

The plaintiffs' claim on the reinsurance policy is for 100*l.* as for a constructive total loss consequent upon a stranding, or in the alternative for 39*l.* 5*s.* under the suing and labouring clause. The defendant, while admitting the interest of the plaintiffs and the stranding of the ship, denies that there was any total loss, or that the plaintiffs ever became liable to pay such a loss; and he denies that the plaintiffs ever incurred any suing or labouring expenses, and says that if they did their right to recover such expenses from him is barred by the clause in the reinsurance policy excluding claims for salvage charges. Thus the question is whether any, and if so what, loss has happened which can be brought within the meaning of the reinsurance policy.

The material facts are very simple. On November 28, 1900, the *Edmund*, while on the insured voyage, stranded shortly after leaving Santa Rosalia, which is on the coast of Mexico. On December 11 a tug was employed by the London Salvage Association for the purpose of getting her afloat again. She floated on January 16, 1901, and was then in safety. Temporary repairs were done to her at a neighbouring port called San Diego, and she was then towed to San Francisco, where she arrived on February 20. There she was dry-docked and permanently repaired. The cost of getting her to San Francisco under temporary repairs was 9000*l.*, and the cost of the permanent repairs was 11,207*l.*—total 20,207*l.* The defendant admits that the shipowners might in the circumstances have treated the vessel when on the bank near Santa Rosalia as a constructive total loss; in other words, that the probable cost of getting her to a repairing port and there making good the damage she had sustained would have exceeded the repaired value of 19,000*l.* as fixed by the original policy. But the shipowners did not take this course; they gave no notice of abandonment, but elected to keep the vessel and claim for a partial loss; and on this footing the plaintiffs have paid. They have paid in all 107 per cent. on the original policy, the amount being made up of a large partial loss and a heavy claim for suing and labouring. A demand seems to have been made upon the plaintiffs for even more than 107 per cent.; but by some compromise the claim was settled at the smaller sum.

The first question is whether there has been any constructive total loss within the meaning of the contract sued on. It is quite a common practice for an insurer against total and partial loss to reinsure the risk of total loss while keeping himself uncovered as to partial loss. Of course he does this at a premium much lower than that which he himself receives for the double risk, and in the event of the insured vessel sustaining damage by the perils insured against it is very much to his interest that the damage should be sufficiently serious to constitute a constructive total loss, for in that event only can he get his loss recouped by his reinsurer, and secure his profit, namely, the difference between the two premiums. So, in the present case, the plaintiffs are anxious to make that which the shipowners treated as a partial loss under the original policy a total loss under the reinsurance policy. But can they? I think not. What the defendant promised by his contract was to indemnify the plaintiffs if they were called upon to pay a constructive total loss. What, then, constitutes a constructive total loss? I think that to constitute a constructive total loss there must be, not only such a damage to the vessel as to make her not worth repairing, but there must also be a notice of abandonment. "A constructive total loss in insurance law is that which entitles the insured to claim the whole amount of the insurance, *on giving due notice of abandonment*": Arnould, 7th ed. s. 1091. The notice of abandonment is a necessary preliminary to a claim for a constructive total loss; and this is so, not only according to insurance law, but also according to the universal practice of merchants and underwriters. The notice of abandonment is an offer made by the shipowner to the underwriter to vest the property in the ship in the underwriter, so that he may deal with it as his own. Without such an offer the underwriter cannot deal with the ship as his own; it remains the shipowner's property; and such a position is inconsistent with the existence of a claim for a constructive total loss. Of course the owner is not compellable to give any notice of abandonment; there is nothing in his policy which obliges him to divest himself of his property in the ship; and this is true whatever the extent of the damage may be. He can always keep his ship and claim for a partial loss, even though the cost of repairs may amount to 100 per cent. of the insured value. But if he elects to take this course, his claim is a claim for a partial loss only.

But it is said that the case is concluded in the plaintiffs' favour by the judgment in *Uzielli* v. *Boston Marine Insurance Co.* (1) That was an action by reinsurers against second reinsurers. The original insurers had received and had ultimately accepted a notice of abandonment from the shipowners, and had settled on the basis of a constructive total loss. They did not, however, pay 100 per cent. There appears to have been some dispute between themselves and the shipowners as to whether the facts justified the abandonment and the claim for a constructive total loss, and this dispute was settled by the shipowners agreeing to take 88 per cent. and giving up the ship to their underwriters. These underwriters had spent a large sum in suing and labouring, which, after deducting the price at which they sold the ship, amounted to 24 per cent. of the insured value. Thus the original underwriters were out of pocket 88 per cent. and 24 per cent., or in all 112 per cent. The plaintiffs, who were the reinsurers of the original underwriters, paid the whole 112 per cent., and brought their action against their re-reinsurers to recover the amount. No notice of abandonment was served on the defendants. The case was tried before Mathew J., when it was contended on behalf of the defendants that there was no constructive total loss. The learned judge rejected this contention. The case went to appeal, and upon this point the decision of Mathew J. was affirmed. The reason submitted in support of the contention (see the argument as reported) appears to have been that the compromise of 88 per cent. shewed that the parties had elected to treat the loss as a partial and not a total loss. This reasoning was treated with scant courtesy by the members of the Court of Appeal. The then Master of the Rolls said, "As to the first point, whether there was a constructive total loss, it is perfectly obvious that there was," and there he left the matter. Cotton and Lindley L.JJ. dismissed the argument equally curtly. The point, however, received as much respect as it deserved. There had been a notice of abandonment, which the underwriters had accepted and acted on by taking the ship and selling it on their own account. That stamped the claim as a constructive total loss; and the mere fact that the amount of the claim was abated could not alter its character. The next point taken in the case on behalf of the defendants was that, whether or not there was a total loss as between the shipowners and the original underwriters, there certainly was none as between the plaintiffs and the defendants; and this upon the ground that the defendants had not been served in their turn with any notice of abandonment. With reference to this point the Master of the Rolls said: "It appears that notice of abandonment was given to the first insurers, and that according to insurance law was sufficient." And Lindley L.J. said: "The point has not perhaps been decided in this country, but it appears to have been considered in America that no notice of abandonment is necessary; at least it has been so laid down by Phillips on Marine Insurance, s. 1506. . . . It seems plain upon principle that no notice of abandonment is necessary in the case of a reinsurance." The soundness of this part of the judgment in *Uzielli's Case* (1) is questioned in a note to s. 1191 in the last edition of Arnould, where it is suggested that when the original insurer has accepted a notice of abandonment from the shipowner he has become entitled to something which he in his turn ought to abandon to his reinsurer. I am not going to criticise the judgment of the Court of Appeal. It is my duty to accept it, and I do so with all the more alacrity because I think it is absolutely right. What is the contract which a reinsurer enters into when he underwrites a policy such as existed in *Uzielli's Case* (1), and such as exists here? It consists of a promise to indemnify the reassured against any liability that he may come under to the shipowner in respect of the risk reinsured, and "to pay as may be paid thereon." What is the effect of such a promise? What is the position as between reassured and reinsurer? It is, in my opinion, this. The reinsurer, when called upon to perform his promise, is entitled to require the reassured first to shew that a loss of the kind reinsured has in fact happened; and, secondly, that the reassured has taken all proper and businesslike steps to have the amount of it fairly and carefully ascertained. That is all. He must then pay. There is nothing in his contract either express or implied which entitles him to have the ship or to deal with it in any way: though he is, no doubt, entitled to require that the original underwriter should realize it in such a way as to reduce the loss as much as may be reasonably possible. Nor is he entitled to rip up the settlement between the shipowner and the original underwriter, except upon the ground that it is dishonest or has been arrived at carelessly. So long as liability exists, the mere fact of some honest mistake having occurred in fixing the exact amount of it will afford no excuse for not paying. He has promised "to pay as may be paid thereon." Such is in my opinion the meaning and effect of these reinsurance policies, and it follows that a notice of abandonment is inapplicable to them. The third point decided in *Uzielli's Case* (1) was that in the circumstances of that case the plaintiffs could recover nothing under the suing and labouring clause. It was held that the original underwriters who incurred the suing and labouring expenses were not the factors or servants or assigns of the plaintiffs within the meaning of the policy sued on, and that, therefore, the claim did not come within the clause. Mathew J. had held differently at the trial. He regarded the original underwriters as the "factors" of every one concerned in averting a loss, including the ultimate re-reinsurer, and had accordingly given judgment for 112 per cent.—88 per cent. for the total loss and 24 per cent. for the

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(1) 15 Q. B. D. 11.

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suing and labouring charges. If it was open to me and necessary to choose between these conflicting judgments, I should prefer that of the judge at the trial. It seems to me that, where there is a chain of reinsurance policies and nothing in any of them to qualify the operation of the suing and labouring clause, the intention of all parties is that the clause shall operate to bind each successive underwriter to make good the expenses which may have been incurred for his benefit. But it is not necessary to discuss this question. For the purpose in hand—to see whether *Uzielli's Case* (1) assists the present plaintiffs—it is sufficient to say that, in conclusion, the Court of Appeal awarded the plaintiffs 100 per cent. It is on this circumstance that the present plaintiffs rely. Mr. Hamilton asks, Why should the Court give the 12 per cent. beyond the 88 per cent.? And he answers the question by saying, because of the clause "to pay as may be paid thereon," and refers to the last sentence in the judgment of Lindley L.J. He says that the 12 per cent. was no part of the total loss, for that had been compromised at 88 per cent.; then he says it was not recoverable under the suing and labouring clause, because the Court had already declared that no cause of action existed on that clause; and he therefore concludes that it was payable only because of the promise to pay as may be paid thereon. From this he argues, as I understand, that it is sufficient in the present case to say that the plaintiffs have paid 100 per cent., and that it matters not whether the payment was accepted in satisfaction of a total loss or a partial loss claim; it was as much and no more than could have been asked for on the basis of a total loss, and, having been paid, is recoverable in this action by virtue of the promise to pay as may be paid on the original policy. On the other hand, Mr. Scrutton, on behalf of the defendant in the present case, says that the reason why the Court of Appeal allowed the plaintiffs in *Uzielli's Case* (1) to recover the 12 per cent. was (as suggested in s. 866 of Arnould, 7th ed.) that it could be claimed as a loss due to perils of the seas, and, therefore, as within the re-reinsurance policy. Neither of these explanations appears to me to be very satisfactory, for I think that either the whole 24 per cent. ought to have been allowed as recoverable under the suing and labouring clause, or none of it if that clause was not operative. But, whatever the explanation may be, I am quite satisfied that the Court never meant to say that, where there had been in fact no original liability for a constructive total loss, the reassured could recover from the reinsurer on the mere ground that he had paid a sum of money which amounted to what might, perhaps, have been claimed from him as the amount of such a loss if such a loss had happened. The essential difference between the present case and *Uzielli's Case* (1) is that in the one there was and in the other there was not a constructive total loss. I think the one case has no application to the other, and that the plaintiffs' claim for a total loss fails.

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(1) 15 Q. B. D. 11.

The other question in this case is whether the plaintiffs can recover on the suing and labouring clause. I think the answer to that question depends upon the meaning to be put on the written words "no claim to attach to this policy for salvage charges," and in my opinion those words are intended to exclude any claim under the printed words in the body of the policy. Mr. Hamilton says that if it had been intended that the printed clause should not form part of the contract, it would have been deleted; and he argues that it is possible to give effect to both the print and the writing if the writing be read as referring to salvage charges proper—that is, to a salvage claim arising out of volunteer services. Of course, if I am right in supposing as I do that "salvage charges" is an equivalent for suing and labouring expenses (and it will be observed that the word "charges" occurs in the print), then the printed clause and the written clause are inconsistent, and the latter must prevail. But, even if I am wrong, I must still consider whether the printed words were intended to stand part of the contract, or were by carelessness omitted to be deleted. If the latter, I ought to read the policy without the words, for, although carelessness should be discouraged, it is not to be punished by injustice. It is quite well known that in policies of marine insurance clauses are frequently left

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(1) 15 Q. B. D. 11.

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standing which are not intended to constitute any part of the contract. "It is," as was said by Walton J. in *Cunard Steamship Co.* v. *Marten* (1), "obviously necessary in every case to consider carefully the description of the risk or special kind of indemnity expressed in the written words of the policy in order to ascertain whether any particular clause of the printed form applies to the insurance effected by the policy. It is most unusual to find that the superfluous or inapplicable words have been struck out of the printed form." I do not forget Mr. Hamilton's argument that the words in the present case are neither superfluous nor inapplicable. I am only drawing attention to the fact that in the hurry of business parties frequently omit to alter the printed words so as to make them exactly conform to the contract which they intend to make. Now the contract which I have to interpret was first reduced into writing in the form of what is called a "slip"—a memorandum of the heads of agreement initialled by the different underwriters who were subsequently to subscribe policies. On this slip appear the letters "No s/c," which it is agreed mean "No salvage charges." In pursuance of this slip the policy now sued on was issued, in which the printed words of the suing and labouring clause were not struck out. But it was proved before me that other underwriters on the same slip had issued a policy in which the words were struck out. The plaintiffs apparently accepted both policies without objection. Was one policy right and the other wrong? I think not; for in my opinion both parties knew quite well that the words were inapplicable to the contract they were making, and thought that it was of no importance whether they were left in or struck out. Salvage charges may, no doubt, in some connection mean claims for volunteer salvage services. But it is quite common to use the words for the purpose of describing those expenses which come within the scope of suing and labouring expenditure; and several witnesses of great experience were called before me to say, and they did say very plainly, that used in a policy such as this they were always understood to bear that meaning. Before the action was tried, express

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notice was given to the plaintiffs that evidence of this kind would be called, and yet the plaintiffs called no one to refute it. I am quite satisfied that if I were to allow the plaintiffs to recover under the suing and labouring clause I should be inventing and giving effect to a contract which the parties never intended to make. Further, I think, on the authority of *Aitchison* v. *Lohre* (1) and *Dixon* v. *Sea Insurance Co.* (2), that volunteer salvage would not be recoverable at all under this policy. Such a claim would be a claim for a partial loss arising from perils of the sea, and could not be recovered under a policy limited to total loss only. And if this be so, it was a useless form to insert the words "no claim for salvage charges," unless they were intended to exclude claims under the suing and labouring clause. The fact is that this policy is an indemnity against total or constructive total loss only, and against nothing else; and such a loss has not happened. The plaintiffs' claim, therefore, wholly fails.

Judgment for defendant.

Solicitors for plaintiffs: *Walters, Johnson, Bubb & Whatton.*
Solicitors for defendant: *Cooper & Co.*

(1) 4 App. Cas. 755.

(2) (1880) 4 Asp. M. L. C. 327.

J. F. C.

[IN THE COURT OF APPEAL.]

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1903
Feb. 13.

TAGART, BEATON & CO. *v.* JAMES FISHER & SONS. WEST HARTLEPOOL STEAM NAVIGATION COMPANY, LIMITED, THIRD PARTIES.

Ship—Charterparty—Freight—Lien on Sub-freight.

A lien on sub-freight given to a shipowner by a charterparty can only be exercised before the sub-freight has been paid to the charterer of the ship or his agent. The lien confers no right on the shipowner to follow the sub-freight after it has been paid.

APPEAL from the trial of the action by Bigham J. without a jury in the Commercial Court.

By a charterparty dated October 6, 1900, the West Hartlepool Steam Navigation Company, Limited, chartered the steamship *Askehall* to Messrs. Baars, Dunwodie & Co. for three years. The charterparty provided (inter alia) that the captain was to be under the orders and directions of the charterers as regards employment, agency, or other arrangement, the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain signing bills of lading or otherwise complying with the same, and that the owners should have a lien upon all cargoes and sub-freights for any amount due under the charter. The hire was to be 1750*l.* per month, payable monthly in advance.

The *Askehall* being subsequently at Pensacola, Baars, Dunwodie & Co. desired to load her with a cargo of their own. They therefore purported to charter the vessel by a charterparty dated May 15, 1901, from some nominees of their own for a voyage to Barrow to carry timber at a fixed freight per standard. They then drew out bills of lading in which they appeared as shippers, and by which the timber was to be delivered to their assigns, he or they paying freight as per charterparty of May 15, 1901. The captain of the *Askehall*, at the request of Baars, Dunwodie & Co., signed bills of lading, indorsing upon them a statement that he had received 3750*l.*

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on account of the freight, and also signed a freight-note, of which the following is the material part:—

"27th May, 1901. Five days after arrival at port of destination of the *Askehall*, of which I am master, I promise to pay to the order of myself one thousand pounds, value received, for account of freight on cargo now on board my said vessel, payable under terms of charterparty dated May 15, 1901, and for the payment of this note I pledge my said freight, and the consignees of my cargo $\frac{\text{and}}{\text{or}}$ my agents are hereby directed to pay the amount of this obligation from the first amount due for freight." This note was indorsed by the captain, "Pay Tagart, Beaton & Co. or order. A. Tritton."

On May 29, 1901, this freight-note and the bills of lading were sent by Baars, Dunwodie & Co. to Tagart, Beaton & Co., who are timber brokers in London, and who were acting as agents for Baars, Dunwodie & Co. for the sale of timber shipped to England by them from Pensacola. At this time Baars, Dunwodie & Co.'s account with Tagart, Beaton & Co. was in debit to about 7000*l*. The letter from Baars, Dunwodie & Co. to Tagart, Beaton & Co. represented the shipping value of the timber on the *Askehall* as 3867*l*., which, with the acknowledgment on the bills of lading that 3750*l*. had been advanced against the freight at Pensacola, made the value of the goods with the paid freight to be 7617*l*. Against this Baars, Dunwodie & Co. drew on Tagart, Beaton & Co. for 6000*l*., and instructed them to sell the timber on Baars, Dunwodie & Co.'s account in the ordinary way, and place the proceeds to Baars, Dunwodie & Co.'s credit. As a matter of fact, the captain of the *Askehall* had received nothing on account of freight, nothing for the indorsement of the receipt of 3750*l*. on the bills of lading, and nothing for the 1000*l*. freight-note.

The receipt of the bills of lading and freight-note was acknowledged by Tagart, Beaton & Co. in a letter, in which they said they would pay it to the credit of Baars, Dunwodie & Co.'s account after collection. On July 9, 1901, Tagart, Beaton & Co. sold the timber to arrive to a firm of Crosfield & Co., and the *Askehall* was ordered to Barrow.

Messrs. James Fisher & Sons were shipping agents at Barrow, and they were anxious to secure the ship's business at that port. Accordingly, on July 10 they telegraphed to Tagart, Beaton & Co. asking if they might have the business. Tagart, Beaton & Co. referred them to a Captain Dyason, who was the agent in England of Baars, Dunwodie & Co. to attend to their shipping business, and he acceded to the proposal of James Fisher & Sons, and on July 13 informed them that they had to collect 1635*l.* freight, of which 1000*l.* was to be used in redeeming the captain's note and the balance accounted for to Captain Dyason. On July 15 Tagart, Beaton & Co. wrote to James Fisher & Sons that they were the holders of the note, adding, "We will forward same for collection to your address in due time." On July 19 the *Askehall* arrived at Barrow, and the discharge began on July 25. Tagart, Beaton & Co. sent the freight-note through their bankers for presentation to James Fisher & Sons; but before they had collected from Crosfield & Co. sufficient to satisfy the note the West Hartlepool Steam Navigation Company intervened by a letter dated August 1 to James Fisher & Sons, informing them that the hire of the *Askehall* had not been paid, and asking them not to part with any part of the freight due on the present cargo, and giving them notice of their lien on sub-freights.

The present action was then brought by Tagart, Beaton & Co., and was resisted by James Fisher & Sons under the direction and with the indemnity of the West Hartlepool Steam Navigation Company.

Bigham J. gave judgment for the plaintiffs, Tagart, Beaton & Co., holding that, in order for the lien of the West Hartlepool Steam Navigation Company to become operative, notice of it ought to have been served on the persons who had to pay the freight, and not upon the persons who were receiving it for the time charterers.

James Fisher & Co. and the West Hartlepool Steam Navigation Company appealed.

Bankes, K.C. (*Noad* with him), for the appellants. A lien on sub-freight confers the right to seize the freight at any time

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that it can be identified. It is not like an ordinary lien on freight, since the sub-freight never comes into the hands of the shipowner. So long as the money paid as sub-freight can be identified, the shipowner can seize it even after it has got into the hands of the charterer's agent. There is no authority on the point.

J. A. Hamilton, K.C. (*Loehnis* with him), for the respondents. It is true that no case of lien on sub-freight has been reported, and the question is treated in the text-books as an open one: Carver on Carriage by Sea, 3rd ed. § 655. It is a contractual right to have the sub-freight paid to the shipowner instead of the charterer or other person entitled to it, but it can only be exercised so long as there is freight to be paid. When the freight has been paid it ceases to be freight, and the lien or right in the nature of lien cannot attach. Here, as soon as the freight was paid by Crosfield & Co. to James Fisher & Sons, who were agents for Baars, Dunwodie & Co., the lien of the West Hartlepool Steam Navigation Company ceased to exist.

Earl of Halsbury L.C. In my opinion this judgment is perfectly right. I desire to confine myself to the one question which emerges out of a rather complicated state of affairs, and, confining myself to that, I am clear that the right over the freight must be exercised at a time when there is freight to be paid as such, and that when the freight has once been paid the lien upon it is gone. The moment that the freight has been paid over by the consignees to persons who are entitled to receive it, the shipowner's right to stop it on its way ceases to exist. I do not think it is necessary to descend into the subtleties which have been suggested in argument, and to inquire whether the freight was paid in such a way that the payment would be earmarked or identified, because in my opinion the answer to that is that the right to stop the payment of the freight to the person to whom it is due must be exercised while the right for such payment exists. The freight here had been handed by the consignees to the defendants, Fisher & Sons, who were the agents of Baars, Dunwodie & Co., and I think the freight was therefore paid as much as if it had been handed to Baars, Dunwodie & Co. themselves, and that when it was so paid there was no longer any lien upon it. Directly the payment was made by the consignees of the cargo the shipowners' right to lien was gone. It makes no difference in my opinion that the payment was made to the defendants. If an agent receives freight for his principal, it is exactly the same as if the freight had been paid to the principal. I am of opinion, therefore, that the judgment of Bigham J. was right and must be affirmed.

LORD ALVERSTONE C.J. I entirely concur with the judgment which has been delivered by the Lord Chancellor. It seems to me that most of the considerations which have been put before us are immaterial, because, as Bigham J. finds in his judgment, before the lien or right in the nature of lien could be exercised, the freight had actually been paid to persons who for the purposes of its receipt may be regarded as the time charterers themselves. No lien or right in the nature of lien existed any longer, because there was no freight to which it could apply. The freight ceased to be freight when it got into the pockets of Baars, Dunwodie & Co. or their agents. A lien such as this on a sub-freight means a right to receive it as freight and to stop that freight at any time before it has been paid to the time charterer or his agent; but such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight.

SIR F. H. JEUNE P. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

Solicitors for respondents: *Druces & Atlee.*

A. P. P. K.

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Feb. 2, 7.

[IN THE COURT OF APPEAL.]

SURTEES *v.* WOODHOUSE.

Landlord and Tenant—Lease—Covenant by Lessee to pay and bear Outgoings—Private Street Works—Expenses charged on Premises before Commencement of Term—Completion of Works—Final Apportionment—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 12, 14.

Where by a covenant in a lease the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises, or the owner or occupier in respect thereof:—

Held (reversing the judgment of Walton J.), that the covenant did not apply to expenses of private street works which, under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date.

Stock v. *Meakin*, [1900] 1 Ch. 683, followed.

Appeal from the judgment of Walton J. in an action tried by him without a jury.

The action was for breach of a covenant contained in the after-mentioned indenture of November 30, 1899, by which certain premises at Maidenhead were demised to the defendant. The facts were in substance as follows: By an indenture dated May 16, 1891, a Mr. Ward, as lessor, demised to the plaintiff, Mrs. Surtees, as lessee, the before-mentioned premises for the term of seven years from March 25, 1891. By the terms of that indenture the lessee covenanted that she would "during the said term pay the said rent in manner aforesaid and also pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." By a supplemental lease dated September 9, 1892, the term was extended to twenty-one years, the lessee covenanting to perform all the covenants in the original lease.

By an indenture which was executed on November 30, 1899, and which recited the leases of 1891 and 1892, the premises were sub-demised by the plaintiff to the defendant for the residue

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of the term save the last day thereof; and the defendant covenanted that he would pay the rent thereby reserved "and at all times during the said term hereby granted observe and perform all the covenants and conditions contained in the said recited indentures of lease on the lessee's part to be observed and performed (except the covenant for the payment of the rent thereby reserved) and keep indemnified the lessor from and against the said covenants and conditions and all claims and demands in respect thereof."

In September, 1899, the corporation of Maidenhead were executing, under the Private Street Works Act, 1892, certain private street improvement works in the street upon which the premises abutted. The works were completed on October 7. The final apportionment of expenses was made on December 11, 1899, that is to say, after the date of the sub-demise, and the amount payable thereunder in respect of the premises was 60*l.* The plaintiff had paid this sum to the successor in title of Ward, her lessor, as being an "outgoing" which she was liable to pay under the terms of the covenant in the original lease of May, 1891, and she sought in this action to recover the sum so paid by her from the defendant under the terms of the indenture of sub-demise of November, 1899.

Walton J. held that, as the amount in question was not payable until after the final apportionment, it was an outgoing which the defendant had by his covenant undertaken to pay. He accordingly held that the plaintiff was entitled to recover the amount claimed.

Feb. 2. *Danckwerts, K.C.*, and *Scarlett*, for the defendant. The case of *Stock* v. *Meakin* (1) decided that the apportioned expenses of private street works under the Private Street Works Act, 1892, become a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, and not merely as from the date of the final apportionment. Therefore the amount here in question became a charge on the premises before the date of the sub-lease; and it is submitted that it must also follow that it became a charge on the owner of the premises in respect thereof at the same time, though not payable until after the apportionment. The covenant by the defendant to perform the covenants in the original lease can only have reference to the performance of those covenants during the term granted by the sub-lease, and it cannot therefore be taken to apply to charges which had accrued before the commencement of that term. The case must be treated as if the defendant had in relation to that term entered into a covenant with the plaintiff in the same terms as those of the covenant contained in the original lease. The covenant in the original lease cannot be construed as applicable to an outgoing which has already become charged on the demised premises at the date of the lease. The word "charged" must have the same meaning throughout the covenant. It must have the same meaning with regard to the premises and to the owner or occupier thereof. If the sum in question became charged upon the premises on the completion of the works, it must also have become at the same time within the meaning of the covenant charged upon the owner in respect of the premises. The learned judge below laid great stress on the word "present" in the covenant in the original lease; but that word has not the force which he assigned to it. The words "present and future" were originally introduced into such covenants for the purpose of meeting a difficulty which had occurred in previous cases: see *Brewster* v. *Kitchin* (1); *Mile End Vestry* v. *Whitby*. (2) The object was to make it clear that the covenant was intended to include taxes, rates, and charges of any kind which might come into existence after the date of the lease, even though not ejusdem generis with any which existed at that date.

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(1) [1900] 1 Ch. 683.

[They also cited *Hornsey Local Board* v. *Monarch Investment Building Society*. (3)]

J. E. Bankes, K.C., and *E. Morten*, for the plaintiff. The learned judge was right in holding that the sum in question was payable by the defendant under his covenant. That covenant was that the defendant would during the term of the

(1) (1697) 1 Ld. Raym. 317.
(2) (1898) 78 L. T. 80.
(3) (1889) 24 Q. B. D. 1.

sub-lease perform the covenants of the original lease. The covenant in that lease was to "pay and bear all present and future" outgoings charged upon the premises, or the owner in respect thereof. The word "pay" in conjunction with the word "present" imports that the outgoings contemplated are such as become presently payable during the term. A charge is not an "outgoing" until it becomes payable. It is difficult to see how an outgoing can be said to be charged on the owner in respect of the premises at a time when it is not payable by him. The decision in *Stock* v. *Meakin* (1) does not apply to the present case. The question there arose as between vendor and purchaser of land, and had relation to the implied indemnity against incumbrances given by a vendor to a purchaser. The question in this case turns upon the express terms of a covenant.

Danckwerts, K.C., for the defendant, in reply.

Cur. adv. vult.

Feb. 7. VAUGHAN WILLIAMS L.J. The question is as to the liability of the defendant to indemnify the plaintiff against the payment of certain moneys which had become payable under the Private Street Works Act, 1892, and which the plaintiff had to pay to her superior landlord, who was the successor in title of the lessor under the lease of 1891. It is sought to make the defendant liable on a covenant in a lease of November 30, 1899, by which he covenanted to observe and perform all the covenants and conditions contained in the said recited indentures of lease and on the lessee's part to be observed and performed, and to keep indemnified the lessor from and against the said covenants and conditions and all claims and demands in respect thereof. The two recited indentures of lease are those of 1891 and 1892, under which the plaintiff became tenant.

I agree with Walton J. that in order to determine the question in this action it is necessary to go back to the original deed of 1891, and to see what would be the position of the lessee under that deed in respect of private street improvement

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(1) [1900] 1 Ch. 683.

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expenses of this kind. The real question we have to decide is whether the covenant by the lessee in the deed of 1891 would cover a charge in respect of works under the Private Street Works Act, 1892, completed before the commencement of the tenancy, but which is not payable until afterwards. If it would, then the defendant is liable in this action; if it would not, then he is not liable. I will treat the defendant therefore for this purpose as being exactly in the same position as if he were the lessee under a lease containing a covenant in similar terms to those of the covenant in the lease of 1891. The words of the covenant are: "During the said term pay the said rent in manner aforesaid, and also pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." In my judgment those words would not cover a rate or charge which had become effective before the date of the lease by reason merely of the completion of the works. This Court decided in *Stock* v. *Meakin* (1), which was a case between vendor and purchaser, that the implied indemnity which a vendor gives to a purchaser would cover a sum chargeable in respect of private street works which had been completed before the date of the sale, though the final apportionment of the expenses was not made until after that date. That case does not necessarily govern the present case, which is not a case of vendor and purchaser, but one which turns upon the construction of the particular words in the lease. It is suggested that the words "all present and future rates," &c., were inserted in order to cover a rate or charge of this kind which had become chargeable on the premises on the completion of the works under the Private Street Works Act, 1892, but which had not become payable because the final apportionment of the expenses had not been made. I do not think that is the meaning of the words. The words were, I think, put in for the purpose of covering the case of rates, taxes, and charges of a kind not existing at the date of the lease. I do not think they have any reference whatever to charges which become charges on the premises before the date of the lease, but are not payable until after that date. When one looks at the precedents of leases in the books, it seems to me that they provide in plain and simple language for a case where a tenant is intended to bear charges to which the property had become liable, but which had not at the time become payable. I do not think that the words in the present covenant had any reference to such a case. Apart from the words "present and future," the covenant is to my mind perfectly plain, and does not impose upon the tenant the obligation to pay charges to which the property had been assessed for private street works, but which had not become payable. For these reasons I am of opinion that the judgment of Walton J. must be reversed, though I differ from the learned judge with very great reluctance.

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(1) [1900] 1 Ch. 683.

STIRLING L.J. read the following judgment:—I agree. I think that the case of the plaintiff cannot be placed higher than if the defendant had by the lease of November 30, 1899, entered into a covenant with the plaintiff in the same terms as the covenant on the part of the lessee contained in the lease of May 16, 1891—namely, a covenant on the part of the lessee during the term granted by the lease of November 30, 1899, to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." The plaintiff contends that the sum sought to be recovered is an "outgoing charged upon the premises or the owner in respect thereof." It is not disputed that that sum is an outgoing within the meaning of the covenant. The nature of the outgoing in question was considered by the Court of Appeal in the case of *Stock* v. *Meakin* (1), and it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of the final apportionment. It was not expressly decided in that case whether or not the amount is "charged on the owner in respect of the premises" as from the same date. By s. 12 of the Private Street Works Act,

(1) [1900] 1 Ch. 683.

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1892, it is provided that "the sums apportioned . . . . shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875." Sect. 14 of the same Act provides that the local authority may from time to time recover "from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum," together with interest from the date of the final apportionment till payment. The Public Health Act, 1875, s. 257, provides that private improvement expenses may be recovered, together with interest from the date of service of a demand for the same, "from any person who is the owner of such premises when the works are completed for which such expenses have been incurred." It appears to me that, by the combined effect of this last section and s. 12 of the Private Street Works Act, 1892, the apportioned amount became charged on the owner at the time of completion of the works as from that date; and this view is supported by the reasoning of Vaughan Williams L.J., who delivered the judgment of the Court of Appeal in *Stock* v. *Meakin*. (1) There is nothing in the Private Street Works Act, 1892, to charge the expenses on the occupier. It was not disputed that at the date of the completion of the works the plaintiff was the "owner" within the meaning of the Private Street Works Act, 1892, of the premises in respect of which the sum sought to be recovered was apportioned; and it follows that the plaintiff had before the commencement of the term granted by the lease become charged with that sum in respect of the premises comprised in the lease. It is said that, although both the premises and the plaintiff as the owner thereof had become charged with the sum sought to be recovered before the date of the lease, yet the sum was not payable until after the date of it. But the covenant is during the term to pay and bear, not "outgoings payable," but "outgoings charged"; and this particular outgoing, which is not of a recurring nature, became charged both on the premises demised and on the owner thereof before the commencement of the term. It is true that the charge could not be enforced against either the premises or the owner until the final apportionment was made, but still it does not seem to me that it is one which the defendant as lessee took upon himself. The learned judge attached great weight to the word "present" which occurs in the covenant contained in the lease of May 16, 1891. If full effect were given to this word, the lessee would be liable for arrears of rates and taxes due and payable at the date of the lease, a conclusion from which the learned judge himself shrank, and which was admitted in argument to be inadmissible. The main object of the introduction of the words "present and future" in covenants such as these is to impose on the lessee the liability to pay, not only taxes, rates, &c., existing at the date of the lease, but also all taxes, rates, &c., subsequently imposed, whether or not of the same nature or for the same purposes as those in existence at the granting of the lease: see Davidson's Precedents in Conveyancing, 3rd ed. vol. v. Part I. p. 22, note (*c*); and, without saying that the effect of those words is in all cases necessarily so limited, I think that this affords a sufficient explanation of them in the present case.

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(1) [1900] 1 Ch. 683.

MATHEW L.J. This case gives rise to a somewhat difficult question with regard to the construction of the covenants contained in the original lease and in the sub-lease to the defendant. At the time when the sub-lease was granted, certain private street improvement works had been completed under the Private Street Works Act, 1892, and a proportion of the expenses of those works had, according to the decision in the case of *Stock* v. *Meakin* (1), already become a charge upon the demised premises, and upon the owner in respect thereof, although it was not payable until after the final apportionment was made. The question is whether, having regard to the terms of the covenants in question, the sum apportioned upon the demised premises is payable by the defendant. Upon reference to the terms of those covenants, it appears to me that the defendant stands in the same position in respect of a charge of this kind as if he had entered into a covenant with the plaintiff in terms similar to those of the covenant contained in the original lease of 1891. In my opinion, it is clear that, having regard to the prospective character of the sub-lease, it could not have been intended to impose upon the lessee an already existing charge, which had become chargeable on the lessor in respect of the premises before the lease was granted. It appears to me equally clear that the covenant of indemnity contained in the sub-lease is also of a prospective character, and was intended to refer only to the performance of the covenants of the lease of 1891 during the term mentioned in the habendum, namely, the residue of the original term save the last day thereof. I do not see anything in any of the terms of the sub-lease to suggest an intention that the sub-lessee should be made liable in respect of expenses already incurred, and which had become a charge on the premises and on the owner in respect thereof before the commencement of the term. I agree that the appeal should be allowed.

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(1) [1900] 1 Ch. 683.

Appeal allowed.

Solicitors for plaintiff: *Lowe & Son.*

Solicitors for defendant: *Willis & Willis, for Alfred Fossick, Maidenhead.*

E. L.

Distinguished. CORKERY *v.* CARPENTER
[1951] 1 K. B. 102

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 25.
1902
Jan. 16.
1903
Feb. 9.

SIMPSON *v.* TEIGNMOUTH AND SHALDON BRIDGE COMPANY.

Bicycle—Liability to Toll—Carriage—5 *Geo.* 4, *c. cxiv. s.* 78.

By s. 78 of 5 Geo. 4, c. cxiv., the owners of a bridge across the Teign were authorized to take the following (amongst other) tolls for passage over the bridge: "For every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence":—

Held, that a bicycle ridden over the bridge was not within the section.

Quære, whether a bicycle is a "carriage hung on springs."

Cannan v. *Earl of Abingdon*, [1900] 2 Q. B. 66, considered.

SPECIAL CASE stated by consent.

In pursuance of an Act passed in the 5th year of the reign of King George IV. (c. cxiv.) intituled "An Act for the building of a bridge over the river Teign at Teignmouth in the county of Devon, and for making approaches to the same," the Teignmouth and Shaldon Bridge Company erected the bridge now known as the Teignmouth and Shaldon Bridge.

By the said Act it is (inter alia) enacted—

Sect. 78: "That the said company or their committee of management shall and may as soon as conveniently may be after a passage shall be made over the said intended bridge cause to be erected a turnpike gate or gates, or toll-gate or gates, at or upon the said bridge . . . . and the respective tolls following shall be demanded and taken at the turnpike or toll-gate, turnpikes or toll-gates, to be erected as aforesaid by such person or persons as the said committee of management shall from time to time appoint . . . . before any foot-passenger, or any horse, mule, ass, or other beast, or any coach, waggon, cart, or other carriage, shall pass or return over the said bridge, or through the same, that is to say—

"For every person on foot, and if with a wheelbarrow or such like carriage, the sum of one penny.

"For every horse, mule, or ass not drawing, the sum of twopence.

"For every horse, mule, or ass carrying double, the sum of threepence.

"For every bull, ox, cow, steer, heifer, or calf, the sum of twopence.

"For every sheep or lamb, boar, sow, or pig, one penny; and if a score or more, to pay after the rate of one shilling and sixpence per score.

"For every coach, chariot, hearse, chaise, berlin, landau, and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence.

"For every waggon, timber carriage, wain, dray, truck, cart, or other such like carriage, with or without springs, the sum of sixpence per wheel, and for each horse or other beast of draught drawing the same, the sum of twopence."

The plaintiff is a member of the Cyclists' Touring Club, and the defendants are the owners of the bridge, and entitled to take the aforesaid tolls.

On December 17, 1900, the plaintiff was desirous of passing over the bridge riding on a bicycle, and presented himself for that purpose, and tendered to the keeper of the toll-gate the sum of one penny. The keeper refused to allow the plaintiff to pass over the bridge without payment of the sum of twopence as a toll, and the plaintiff paid such sum under protest in order to obtain passage over the bridge.

The question for the opinion of the Court was with what toll were the defendants entitled to charge the plaintiff when passing over the said bridge riding on a bicycle.

1901. Nov. 25. *Macmorran, K.C.* (*Chester Jones* with him), for the plaintiff. There was no power to charge the toll demanded. The sub-section relied on by the defendants only applies to carriages drawn by beasts of draught.

[He was stopped.]

Foote, K.C. (*A. B. Shaw* with him), for the defendants.

The section was intended to include every description of carriage. A bicycle is a carriage: *Cannan* v. *Earl of Abingdon* (1); see also *Plymouth Tramways Co.* v. *General Tolls Co.* (2), where a tramcar was held to be a carriage. The section cannot apply only to carriages drawn by horses; the expression "for each horse" merely imposes a toll on the horses, if there are any, as well as on the carriage. As the plaintiff was riding the bicycle, he was not chargeable as a person on foot, and will escape toll altogether unless he comes within this sub-section. A bicycle is hung on springs, for (*a*) the seat is placed on springs, and (*β*) the tyres are springs within the Act.

Macmorran, K.C., in reply. Either the plaintiff was a passenger on foot, or he was not within the Act at all. The only carriages intended to be paid for are those drawn, or at any rate capable of being drawn, by horses or other beasts. A bicycle is not a carriage for the purposes of a turnpike Act: *Williams* v. *Ellis*. (3)

WRIGHT J. I do not think that the *Plymouth Tramways Case* (2) helps much in the determination of the present case; it is easy to understand that a tramcar drawn by horses was a coach drawn by horses. Neither is *Cannan* v. *Earl of Abingdon* (1) much in point, for the language of the section in that case, "or other carriage whatsoever," is much wider than that of the present statute; the judgment in that case proceeds on those words, and there are no such words here. *Williams* v. *Ellis* (3) is perhaps the case most in point, though it is not easy to reconcile it with *Cannan* v. *Earl of Abingdon*. (1) But, after all, it is necessary to consider the words used in this Act of Parliament, and to say whether it is consistent with the rules of common sense and grammar to say that a bicycle comes within them. No doubt in some of the sections the language used is very general, and, if they are not limited by the toll section, there is much to be said for the contention of

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(1) [1900] 2 Q. B. 66.

(2) (1896) 75 L. T. 467; 13 Times L. R. 74; 14 Times L. R. 531.

(3) (1880) 5 Q. B. D. 175.

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the defendants that no limitation should be put on the word "carriage," but that everything which for any ordinary purpose could be held to be a carriage would be within the Act. But the language of the toll section is different: "Every person on foot and if with a wheelbarrow or such like carriage, the sum of one penny"; these words seem to include a person on foot whether with or without a wheelbarrow or such like carriage. Then after an enumeration of certain animals not drawing carriages come the words, "For every coach, chariot, hearse, chaise, &c.," and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence."

The last part of the description in the section does not apply to the present case, and if a bicycle comes within the section at all it must fall within the words "other carriage hung on springs." If I am to determine this case on a consideration of the question whether a bicycle falls within the description of a carriage hung on springs, I shall require further facts or further information, for at present I am not in a position to say how this bicycle was constructed; I think, therefore, that I must determine this case without reference to that point for the present.

It seems to me that I cannot, without doing violence to the meaning of the section, consider that this paragraph of the section is concerned with any carriages except such as are drawn by horses or other beasts of draught. There must be some limit to the adaptation of the language used in old Acts of Parliament to modern circumstances. It is impossible that they can be stretched so as to meet everything that invention may produce in modern days. The remedy is by legislation. In any reasonable sense of the words, the last two paragraphs of the section deal only with vehicles drawn by horses or other beasts of draught; I could not hold otherwise without doing violence to the ordinary rules for the construction of statutes. I am not asked to say whether the plaintiff was a person on foot, nor whether he was a person on foot with a wheelbarrow or other such like carriage, so that those questions do not arise; if they did, there would be a good deal to be said on both sides. I think that the toll of twopence has not been justified, and there must be judgment for the plaintiff.

Judgment for the plaintiff.

1902. Jan. 16. *Foote, K.C.*, for the defendants, having submitted that the bicycle was a carriage within the decision in *Cannan* v. *Earl of Abingdon* (1), and that it was "hung on springs" within the meaning of the section, evidence was called by the defendants. Shortly summarized, it was to the effect that the saddle was borne by springs, and that under ordinary conditions the weight of the rider was borne by the saddle; that the springs were attached to the saddle, and also to the rigid framework of the machine above the wheel; that the expression "hung on springs" was, in the coach-builders' trade, considered to include all carriages whether borne on springs or suspended from them, and that all carriages having springs were properly described as hung on springs.

Chester Jones, for the plaintiff, contended that a bicycle was merely a carriage with a spring-seat or spring-saddle attached, and called evidence to that effect.

WRIGHT J. It is frequently almost impossible to apply the language of old statutes to modern inventions not contemplated at the time the Acts were passed, but I must deal with the case as well as I can, endeavouring to place a reasonable construction on the old statute, so as to give effect as far as possible to its object—that of taxing vehicles crossing this bridge. I have already held that the last two provisions of the section are limited to vehicles which are adapted or intended to be drawn by horses or other beasts of draught, although not necessarily drawn by them in fact. I have now to say whether a bicycle is a carriage, and whether it is a carriage hung on springs, within the meaning of the Act. The particular section treats a wheelbarrow as a carriage, and in my opinion a bicycle is as much a carriage as a wheelbarrow; apart, therefore, from the difficulty which I dealt with on the last occasion, I must

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(1) [1900] 2 Q. B. 66.

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hold, having regard to the authorities cited, that this bicycle would have been a carriage within this particular section.

Then, is it a carriage hung on springs within the section? In my opinion this particular bicycle, as distinguished from others as to which I have no information, is hung on springs: its saddle is supported entirely by springs, which form an essential part of the structure, and do not in any way represent such a thing as a spring-cushion, on which a person riding in a carriage may rest if he pleases. These springs are an integral part of the structure, and as such serve to distribute the weight. There is no question that the rider and his saddle are at all times mainly supported by the springs; sometimes they are entirely so supported; and the springs, according to the evidence, serve the same purpose as the cee springs of a carriage. If I am wrong in my view that the section applies only to carriages intended for animal draught, I find that this particular bicycle is within the meaning of the section a carriage hung on springs, and is liable to pay toll as such. It must not be supposed that this judgment is intended to deal with bicycles in general.

W. J. B.

The defendants appealed from so much of the judgment of Wright J. as held that they were not justified in charging the plaintiff the toll of twopence (1)

1903. Feb. 9. *Duke, K.C.*, and *A. B. Shaw*, for the appellants. The toll was justified. The purpose of the Act was the taxation of all vehicles or persons using the bridge, and it is a reasonable construction of the section to make it apply. The appellants have reduced the toll in the case of bicycles, and do not insist on the sum of sixpence for each wheel which the Act would enable them to charge. A bicycle is a carriage: *Taylor* v. *Goodwin* (2); *Cannan* v. *Earl of Abingdon* (3); for it is a mechanical apparatus for the conveyance of persons over

(1) The plaintiff appealed against that part of the judgment of Wright J. which held that the particular bicycle in question was a "carriage hung on springs," but, as judgment was given for the plaintiff on the defendants' appeal, this appeal was not argued.

(2) (1879) 4 Q. B. D. 228.

(3) [1900] 2 Q. B. 66.

the ground. The method of propulsion is immaterial, and a vehicle does not cease to be a carriage because it is propelled by a man's muscles any more than it does if propelled by steam or electricity. If the view taken by Wright J. be correct, motor cars could not be charged under this Act, because they are not drawn by horses or other beasts of draught. *Williams* v. *Ellis* (1) turns on the construction of different sections from those now under consideration, and is no authority. The intention of the Legislature was to include all carriages using the bridge: *Plymouth Tramways Co.* v. *General Tolls Co.* (2)

It is a carriage hung on springs, because the saddle is supported on springs resting on a solid frame which in turn rests on pneumatic tyres.

Chester Jones (*Macmorran, K.C.*, with him), for the respondent. A bicycle is not chargeable under this Act, or, if it is, it comes under the first clause, "for every person on foot, or with a wheelbarrow or other such like carriage." The charge of twopence was therefore unjustifiable. In *Taylor* v. *Goodwin* (3) a bicycle was held to be a carriage only for the purpose of the Highway Acts. This is made plain in the judgment of Lush J. in *Williams* v. *Ellis* (1); and now, by s. 85 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), bicycles are declared to be carriages within the meaning of those Acts. In the ordinary sense of the word, a bicycle is not a carriage.

[He was stopped.]

EARL OF HALSBURY L.C. I do not see my way to differ from my learned brother Wright on this question. It appears to me that we have the decision of Lush and Bowen JJ. in *Williams* v. *Ellis* (1) on words which, for this purpose, I cannot distinguish from the words with which we have to deal, and certainly I feel great difficulty in saying that I entertain any different view from that which they have expressed. The truth is that, when you are dealing with a question of this sort and endeavouring to find out whether a thing is taxable or not under Acts of this character, the first thing to do is to find out whether

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(1) 5 Q. B. D. 175.

(2) 75 L. T. 467; 13 Times L. R. 74; 14 Times L. R. 531.

(3) 4 Q. B. D. 228.

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there is anything which corresponds in the ordinary and natural course of meaning to the language which the Legislature at the particular time used in making the things mentioned in such Acts the subject of taxation. I do not think it is a question merely of words whether the thing sought to be made taxable was called a coach or not, if it was intended to fill the functions of a carriage according to the description given in the original Act. I quite agree that the mere fact that it was called by a different name from those enumerated in the Act would not matter, because the language would have been used by the Legislature in a sense which everybody could understand, and which would comprehend the particular thing although it might be called by another name. I think that is the meaning of the general words with which the section in question concludes, and that although there was a known certain form of coach or carriage which was in vogue at that time, yet in effect the Legislature says: "Well, if there are other things of this sort which are made hereafter, or which we have forgotten to enumerate, they will be equally liable to the tax." But to my mind the whole substance of the thing is entirely reversed if the course taken by those desiring to make a thing taxable is to analyze the things done by a carriage, and to take some one or more of them and say, "This is applicable to this new thing and therefore it is taxable." If that had been so, I do not believe the nature of the taxation would have been the same, and I think it is not immaterial to observe what the taxation was. Whether it is in the form of a rate, or whether it is in the form of an Imperial tax, it is equally taking from the subject some money in respect of something or another which he does or has the use of. Here the taxation would be for every wheel of the bicycle sixpence if the clause is to be made applicable. It is true that this has been modified by the company, because I suppose it would be too monstrous that a bicycle should be charged a shilling because it has two wheels. I think that it is not without its importance in considering what was the nature of the thing in the contemplation of the Legislature at the time the Act was passed that the tax of sixpence per wheel is placed upon it.

I am quite contented with my brother Wright's judgment, confirmed, as I think it is, by the judgment in *Williams* v. *Ellis.* (1) It is satisfactory to find that Lush J., who decided in *Taylor* v. *Goodwin* (2) that a person riding a bicycle at a dangerous pace might be convicted of furiously driving a carriage, was the same judge who decided in *Williams* v. *Ellis* (1) that a bicycle was not a carriage within the particular Act of Parliament under which it was sought to tax it, because it marks the distinction which the learned judge seems to have taken between an enactment which is contemplated as being for the protection of the public, and which must therefore be given the widest possible scope, and a taxing Act. Nobody can doubt that a bicycle, whether it was a motor bicycle or one only propelled by human agency, might be a very dangerous thing if driven at an undue speed through a public highway.

I confess I am not satisfied with the judgment of Phillimore J. in *Cannan* v. *Earl of Abingdon* (3), because I think it proceeded upon a wrong principle of construction. I do not think you can analyze scientifically the different functions and objects of each part of the machinery of what is alleged to be a carriage, and say, "This carries somebody, and this does not carry somebody, and this is propelled by machinery and the other by human agency, and in this case the man's feet reach the ground, and in another case the man's feet are off the ground." I think that to do so is to proceed upon a wrong principle of construction in regard to such an Act as we have now to consider. The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within the Act would substantially correspond to what the Legislature meant by a carriage (called by whatever name you please), I think that the tax would apply; but if not, it is not for the Court to make an effort by ingenious subtleties to bring within the grasp of the tax something which was not intended in substance by the Legislature at that time to be the subject of taxation. Under these circumstances, I cannot differ from my brother Wright in the conclusion at which he has arrived, and I think, therefore, his judgment ought to be affirmed.

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(1) 5 Q. B. D. 175.

(2) 4 Q. B. D. 228.

(3) [1900] 2 Q. B. 66.

LORD ALVERSTONE C.J. I desire to give my reasons for concurring, as I do, with the judgment of the Lord Chancellor, because it is important to keep in view that our decision may not govern any case in which the terms of the Act of Parliament are not the same as those of the particular Act now before us. I confess if we were in a position to deal with this question by some general description or definition of the word "carriage," while I do not wish to adopt entirely the reasons given by my brother Phillimore in *Cannan* v. *Earl of Abingdon* (1), I should have great difficulty in saying that a bicycle may not in many Acts of Parliament be a carriage; but it seems to me that Wright J. considered the question from the right point of view in regard to this Act, which is a charging Act. The charging section provides with regard to any coach, waggon, cart, or other carriage that shall pass or return over the bridge that certain tolls shall be paid. Then come the classifications; the first one is: "For every person on foot, and if with a wheelbarrow or such like carriage, the sum of one penny." Therefore, as has been truly said in the course of the argument, for the purpose of this Act a wheelbarrow is treated as a carriage. Then come the two charging sections at the end: "For every coach, chariot, hearse, chaise, berlin, landau, and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence." "For every waggon, timber carriage, wain, dray, truck, cart, or other such like carriage, with or without springs, the sum of sixpence per wheel." Now, when those two charging sections are contrasted, it seems to me impossible to say that a bicycle is more ejusdem generis, if I may use that expression, with the last two clauses than it is with the first clause. I think that, as the Lord

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(1) [1900] 2 Q. B. 66.

Chancellor said, looking to the maximum toll on every wheel and the names of the carriages which are there set out, and the fact that they are coupled with an extra charge for the horse or beast of draught, other carriages ejusdem generis must be vehicles which at the time this Act was passed would come within that class. In the same way carriages, to be ejusdem generis with "wheelbarrow or such like carriages," would have to consist of what might come within that class in the contemplation of the Legislature at the time the Act was passed. That is all I wish to decide myself. I think a bicycle does not come within the class of carriage enumerated in the last clauses of the charging section in respect of which the bridge company was empowered to make certain tolls.

Now, there are one or two other matters I ought to mention in order to avoid misunderstanding afterwards. I have already said that I think for the purpose of many Acts that a bicycle may be a carriage, and I also think myself, though we have not heard it argued by the other side, that a bicycle such as this is described to be may be a carriage which is "hung on springs." The word "hung" in this connection means "supported by," and does not necessarily mean hung in the ordinary sense of the word.

With regard to the two cases that have been cited, of course the decision in *Williams* v. *Ellis* (1) turns entirely upon the same view of ejusdem generis which we take, because, although the words in the Act there under consideration were "every carriage of whatever description," Lush J. construed that as referring to a description of the carriages previously specified in the earlier section.

In *Cannan* v. *Earl of Abingdon* (2) the words of the Act were very different indeed. The words were: "For every coach, chariot, berlin, hearse, chaise, chair, calash, waggon, wain, dray, cart, car, or other carriage whatsoever," and I am by no means sure that if that had been the only charging section in this Act that I should not have come to the conclusion in this case that a bicycle was included. I think, however, the judgment of Wright J. in the present case is correct, because, when the charging sections in the Act under consideration are contrasted and an endeavour is made to apply the language used in those sections to the particular article proposed to be taxed here, I am by no means satisfied it comes within the charging section under which the charge was made. I think, therefore, the appeal should be dismissed.

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(1) 5 Q. B. D. 175.

(2) [1900] 2 Q. B. 66.

SIR F. H. JEUNE P. I agree with the judgments which have just been delivered, and I only wish to add that it seems to me that Wright J. was substantially right on the main ground on which he proceeded. There are three categories of carriages in this Act, and I quite agree that what we have to look at is the actual language of this Act, and not of any other. The first category is "for every person on foot, and if with a wheelbarrow or such like carriage, the sum of one penny." Then there are the other two, the first of which applies to a coach, carriage, chariot, hearse, and so on, hung on springs, and the second obviously applies to carriages or carts used for the purpose of conveying heavy material which may be moved with or without springs. Now within which of these three categories does a bicycle most fairly come? I do not feel disposed to hold that it comes within any one of the three; but, if it does come within any, it appears to me to come more within the words "a wheelbarrow or such like carriage" than it does within any other, for this reason—that the second and third categories appear to apply only to carriages intended to be drawn by horses or other beasts of draught.

I agree with the view of Wright J. The fact that horses are mentioned in both of the last categories shews that the class of carriage which the Legislature had in its mind in making those categories is that of a carriage which, not necessarily at the moment of crossing the bridge, but in the ordinary way would be drawn by a horse or other beast of draught. It is impossible to get away from that, and that is the view, as I understand it, on which Wright J. proceeded. As regards the description of a carriage hung on springs, I do not wish to express any difference of opinion from the Lord Chief Justice on that point, but I must confess that I have a very great difficulty in following, although it is a finding of fact, the statement which makes a bicycle which has a seat supported on springs a carriage hung on springs. It appears to me to be a very forced mode of description, and one which would not be resorted to except for the apparent necessity of endeavouring to get a vehicle of this sort within this particular section. I think that all that it is necessary for me to say is that I think the judgment of Wright J. is right, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Leslie Williams.*
Solicitors for defendants: *Busk, Mellor & Norris.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Feb. 3.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF WAKEFIELD, Appellants; COOKE and Others, Respondents.

Local Government—Streets—Private Street Works—Objections to Proposed Works—Determination that Street is a Highway—Subsequent Proceedings in respect of Street—Estoppel—Res Judicata—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

In proceedings taken in 1898 under sections of the Wakefield Corporation Act, 1887, which are identical with ss. 6, 7, and 8 of the Private Street Works Act, 1892, for sewering, paving, &c., part of a certain street in the city, the justices determined, on an objection taken by frontagers, that the street was a highway repairable by the inhabitants at large. In 1900 fresh proceedings were taken under the same sections with the same object, and dealing with that part of the street which was the subject of the former proceedings and an additional length of the same street. On the hearing before justices an objection was taken by frontagers that the street was a highway repairable by the inhabitants at large:—

Held, that the matter was res judicata, and that the previous decision was a bar to the proceedings.

Judgment of the Divisional Court, [1902] 1 K. B. 188, reversed.

Reg. v. *Hutchings*, (1881) 6 Q. B. D. 300, distinguished.

Appeal from a judgment of the King's Bench Division, reported [1902] 1 K. B. 188, on a special case stated by justices.

Under the Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), ss. 29, 30, and 31, which are identical with ss. 6, 7, and 8 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), the corporation of Wakefield obtained power to deal with private street works within the city.

Sect. 29 of the local Act, which corresponds with s. 6 of the general Act, and is set out at length in the report of the case below, provides that where any street or part of a street is not sewered, levelled, paved, metalled, flagged, kerbed, channelled, made good, and lighted to the satisfaction of the corporation, the corporation may from time to time resolve to do the works required, and the expenses are to be apportioned on the premises fronting, adjoining, or abutting on such street or part of a street. By sub-s. 2 the surveyor is to prepare a specification of the works with plans and sections (if applicable), an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged. These are to be submitted to the corporation, who may approve the same. By sub-s. 3 the resolution approving the specifications, &c., is to be published and copies served on the owners of the premises shewn as liable. The specifications, &c., are to be open to inspection for a month from the first publication.

By s. 30, which corresponds with s. 7 of the public Act, during the month any owner of any premises shewn in the provisional apportionment as liable to be charged may object to the proposals of the corporation on any of the following grounds: (*a*) that an alleged street is not and does not form part of a street within the meaning of the Act; (*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large; (*c*) that there has been some material informality, defect, or error in or in respect of the resolution, notice, plans, sections, or estimates; (*d*) that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive; (*e*) that any premises ought to be excluded from or inserted in the provisional apportionment; (*f*) that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection, or (where the provisional apportionment is made with regard to other considerations than frontage as thereinafter provided) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of the premises.

By s. 31, which corresponds with s. 8 of the public Act, the corporation may after the expiration of the month apply to a Court of summary jurisdiction to appoint a time for determining the matter of all objections, and the Court may proceed to hear and determine the matter of all such objections, in the same manner as if the corporation were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable, and may quash in whole or in part, or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the corporation.

In March, 1897, the corporation by resolution approved a specification of the private street works required to be carried out in a street known as Sludge Lane in the city, together with plans, sections, estimate, and provisional apportionment of expenses. The resolution was duly published and served on the owners of the premises shewn as liable, and a number of owners gave notice of objection—"That Sludge Lane is a highway repairable by the inhabitants at large." The objection came on for hearing before certain justices for the city, who, by an order dated January 6, 1898, determined that the objection was a good and valid objection.

In November, 1900, the corporation resolved to do certain works in Sludge Lane, and directed that a specification with plans and sections, an estimate of the probable expenses, and a provisional apportionment should be prepared. These were accordingly prepared, and in February, 1901, were approved by resolution of the corporation, and the requirements of the Act as to notice were complied with. A number of owners objected on the grounds that Sludge Lane did not form part of a street within the meaning of the Act, and that it was a highway repairable by the inhabitants at large. At the hearing before the justices it was admitted that the resolutions, plans, notices, and objections, with reference to the matter before the Court, related to so much of Sludge Lane as was the subject-matter of the proceedings in January, 1898, and an additional length of eighty yards in a straight line and continuous therewith, and a certified copy of the order of the justices on the previous occasion was put in evidence. Some of the objectors who were present or represented at the hearing were present or represented in the former proceedings.

It was contended on behalf of the objectors that as the Court of summary jurisdiction, sitting in January, 1898, had determined that Sludge Lane was a highway repairable by the inhabitants at large, and that as the subject-matter, namely, whether Sludge Lane was such a highway, and the parties, namely, the corporation, on the one hand, and the owners of property abutting on the street on the other, were the same, the matter was res judicata, and the corporation were, therefore, estopped in the present proceedings by the determination of the Court in January, 1898.

It was contended, on the authority of *Reg.* v. *Hutchings* (1), on behalf of the corporation, that the Court in January, 1898, had no power to try the question whether Sludge Lane was a highway repairable by the inhabitants at large; and that the subject-matter was not the same by reason of the corporation having taken a greater length of road than on the previous occasion, and proposed to do the work in a different manner, and that the parties were not the same; and it was urged that since the proceedings in January, 1898, the corporation had discovered and intended to adduce in evidence certain additional facts relevant to the objection that Sludge Lane was a highway repairable by the inhabitants at large.

The justices were of opinion that the principle of the decision in *Reg.* v. *Hutchings* (1) did not apply, as the Court in 1898 had to decide whether the road in question was a highway repairable by the inhabitants at large, that being one of the objections raised under s. 30 of the Act; that the extension of the road and the change of ownership did not affect the question before the Court; and that the question whether Sludge Lane was a highway repairable by the inhabitants at large was res judicata. They therefore declined to hear any evidence or go into the merits of the objection, but, at the request of the corporation, stated a case for the opinion of the Court.

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(1) 6 Q. B. D. 300.

The corporation appealed, and the case came before a Divisional Court, and it was decided that the objection taken that there was a previous determination that the street in question was a highway repairable by the inhabitants at large was no bar to the proceedings in this case, and judgment was given for the appellants. (1)

The respondents appealed.

Danckwerts, *K.C.* (with him *Compston*), in support of the appeal. The decision in *Reg.* v. *Hutchings* (2) does not apply, for under this statute the question whether a street is a highway repairable by the inhabitants at large may be raised for the decision of the justices. The object of this legislation was to provide that objections should be dealt with at the outset instead of being taken when all the expense of doing the works had been incurred. The determination of justices on any of the points that may be taken under s. 30 is final. Some matters complained of may, no doubt, be remedied by amendment, but not an objection which goes to the root of the matter. [He referred to *Reg.* v. *Hickling* (3); *Reg.* v. *Haughton* (4); *Reg.* v. *Hartington.* (5)]

Macmorran, *K.C.*, and *William Senior*, for the corporation. The objections specified in s. 30 are those that could be taken under the procedure before the Act; but at a later stage of the proceedings. Under s. 31 the justices may proceed to determine the matter of the objections in the same manner as if the corporation were proceeding summarily to enforce payment of a sum of money—that is, the objections are to be treated as they may be under a summons under s. 150 of the Public Health Act. *Reg.* v. *Hutchings* (2) is in point, and decided that the determination of justices under s. 150 is not only not a judgment in rem, but creates no estoppel between the parties. In the case of a summons for obstruction to a highway the justices must determine the question of highway or not highway; but that is neither a judgment in rem nor an estoppel between the parties. In *Attorney-General of Trinidad* v. *Eriché* (1) it was necessary for the determination of the case that the magistrate should go into the question of title; but his judgment on the point was not res judicata, because he was not a tribunal to determine a question of title. Here the justices had no power to determine, except for the purpose of deciding the matter before them, that the street was a highway repairable by the inhabitants at large.

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(1) [1902] 1 K. B. 188.

(2) 6 Q. B. D. 300.

(3) (1845) 7 Q. B. 880; 14 L. J. (M.C.) 177.

(4) (1853) 1 E. & B. 501; 22 L. J. (M.C.) 89.

(5) (1855) 4 E. & B. 780; 24 L. J. (M.C.) 98.

Danckwerts, K.C., in reply.

VAUGHAN WILLIAMS L.J. I regret to say that on the arguments that have been addressed to us I have arrived at a different conclusion from that arrived at by the learned judges in the Divisional Court, and am of opinion that the appeal should be allowed.

The decision of the Court, expressed in the judgment of the Lord Chief Justice, is based on the decision of the Court of Appeal in *Reg.* v. *Hutchings* (2), and he expressly says that, in his opinion, there is nothing to differentiate that case from the present one. This special case is stated in respect of proceedings under a local Act, but the terms of the local Act are, so far as is material to the decision of this case, identical with corresponding provisions in the Private Street Works Act, 1892, and although that Act is one the application of which only arises on its adoption by a local authority, still I think the Legislature, by adopting provisions which were frequent in local Acts, indicated the view that was taken with respect to the matters dealt with. It is not an unreasonable inference to draw from the similar sections found in both Acts that it was intended in the general Act to formulate a means of dealing with difficulties of procedure that in times gone by had occurred with regard to all these matters, the doing of which is cast on

(1) [1893] A. C. 518.

(2) 6 Q. B. D. 300.

local authorities in the interest of the inhabitants of various localities. It was considered desirable, as far as possible and at as early a date as possible, to obtain finality. If the machinery for determining the various questions that may arise is such that they cannot be settled until the work is done, and the expenditure is incurred, it is a misfortune, both for the local authority and for the inhabitants. In that state of things, it occurred again and again that a particular inhabitant objected to proceedings intended to be carried out for the general benefit, where the objection was personal to the objector. On other occasions the nature of the objection was one that went to the root of the matter with regard to the right of the local authority to execute the proposed work, as, for example, where power is given to do certain things in a street, and the objection was that the place where it was proposed to do the work was not a street. It is obvious that such an objection is not personal to the objector, but one dealing with the right to put in force the statutory powers in that particular case. Where the objection is of a personal nature—as, for instance, that the objector ought not to be included as a frontager, or that certain frontagers have been improperly excluded—it was found to be highly inconvenient that a public work should have to be abandoned because of a defect, not in the scheme itself, but in its application to individuals. Where the objection is in its nature one that negatives, as a condition precedent, that the proposed work comes within the powers conferred by the statute, it is in the general interest that it should be decided once for all.

In my opinion the decision of Lord Selborne and the Lords Justices in *Reg.* v. *Hutchings* (1) was simply a decision that, in that particular case, the only power that the justices had was to decide whether or not a particular person ought to be ordered to pay a sum of money. There was no authority given to the justices by the Public Health Act, 1875, s. 150, to deal directly with any other question, and, under those circumstances, though incidentally the question whether the highway was repairable by the inhabitants at large had to be determined,

(1) 6 Q. B. D. 300.

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yet that was not the subject-matter of a direct decision under the jurisdiction given to the justices. Further, in that case the objection was raised by a frontager on his own account, and, although that might raise an estoppel as between the same parties, it was not, in form at all events, an objection the decision on which would be binding between other parties and the local authority as representing the inhabitants of the district. I mention this last matter because on that ground there was a difference of opinion between Lord Selborne and the judges of the Queen's Bench Division. Those learned judges dealt with the case (1) somewhat on the lines of the decisions in *Reg.* v. *Haughton* (2) and *Reg.* v. *Hartington* (3), in which there were decisions of public matters, by persons having a duty in respect of those matters, and held that the findings should, in the interest of the public, be treated as conclusive evidence in any Court into which the same matter might come. If not in form judgments in rem, they were so in all essentials affecting questions of status in which the whole public was interested, and as being the decisions of a competent Court at the instance of persons having an interest in the matters to be decided. I understand Lord Selborne's decision to be that that could not be said in the case of *Reg.* v. *Hutchings.* (4) It could not be said of the question whether a frontager was to pay a particular sum of money, and, though it was necessary to the determination of that question to decide whether a certain road was a highway, the decision on this point was not a decision as to status in the sense of the cases to which I have referred. I accept the decision in *Reg.* v. *Hutchings* (4), and hope that in what I am saying I am following not only the letter, but the spirit of that decision. I am far from saying that if the identical question had arisen without any fresh legislation that I should be disinclined to follow that case. I only wish to add that in the *Attorney-General of Trinidad* v. *Eriché* (5) the judgment of the Privy Council appears to take this view of *Reg.* v. *Hutchings.* (4)

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(1) (1880) 5 Q. B. D. 353.

(2) 1 E. & B. 501; 22 L. J. (M.C.) 89.

(3) 4 E. & B. 780; 24 L. J. (M.C.) 98.

(4) 6 Q. B. D. 300.

(5) [1893] A. C. 518.

Turning to the Act itself, it cannot be doubted that the law and procedure in respect of the matter dealt with was in an unsatisfactory condition. Whichever of the modes of raising an objection was taken, it could never be raised in such a way as to prevent a waste of time and money. It was also desirable that under proper conditions and in proper cases a decision should be arrived at which would bind every one. Local authorities came, as I understand, from time to time to Parliament with local Acts such as the one before us, with schemes similar to that before us, and the procedure under those Acts received approval in the public Act of 1892. Sect. 30 of the Wakefield Corporation's local Act states the nature of the objections that may be made. The first two objections, (*a*) that the street proposed to be dealt with does not form part of a street within the meaning of the Act, and (*b*) that it is a highway repairable by the inhabitants at large, go to the root of the matter, and are of such a character that the local authority cannot get rid of them by amendment. The other objections are personal in their nature, or relate to matters that can be dealt with by amendment. One of the great difficulties that a local authority experienced was that, when objection was taken that some one was improperly included or excluded from the apportionment, the authority had to begin over again, and that difficulty was removed by this legislation. That being the nature of the objections that can be raised, s. 31 provides that after a month the corporation may apply to a Court of summary jurisdiction to appoint a time for determining the matter of all objections, and that Court may proceed to hear and determine "the matter of all objections," and may quash in whole or in part, or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of an objector or the corporation. It seems to me to be impossible to read this section without seeing that it was drawn with reference to the specific objections set forth in s. 30, being those that objectors may make within the specified time. If the objection is one that goes to the root of the matter, the Court of summary jurisdiction can deal with it by affirming or negativing it. If the objection is not of that

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class, then the justices may apply, and ought to apply, the other remedies indicated in s. 31. It may be even in such a case that the proper remedy is to begin again; but that cannot be so when the objection is of such a nature that affirmance of it is permanent. It seems to me to be obvious that the Legislature intended that all objections should be dealt with, not necessarily so as to defeat the scheme, but certainly once and for all. It follows, if this view is correct, that an objection taken that the street was a highway repairable by the public at large, being directed to the jurisdiction of the local authority, if it is once determined is finally determined. I cannot myself see that any evil follows from this, for the Legislature has provided that every one interested may object, and that objectors are to have notice, so that they may be present, if they think fit, at the hearing of the case. There appears to me to be nothing in the decision in *Reg.* v. *Hutchings* (1) to prevent our coming to the conclusion at which I have arrived; and I think that the question whether the matter was res judicata was rightly decided by the justices, and that this appeal should be allowed.

STIRLING L.J. I am not prepared to differ from the conclusion arrived at by the other members of this Court, though I have had, and still entertain, considerable doubt whether the effect of s. 31 is as extensive as my Lord has stated. My doubt is whether s. 31 was intended to do more than to provide a speedy means of allowing the scheme of the corporation to proceed, and, for that purpose only, to provide for the decision of objections to the scheme. If that is the correct view of the enactment, it would appear to follow that it was not the intention of the Legislature to leave it to the justices to decide once for all whether the street is a highway repairable by the inhabitants at large. At the same time, I feel the force of the arguments that have been brought before us from the opposite point of view, and I do not dissent from the conclusion, at which my Lord and my brother Mathew have arrived, that the appeal should be allowed.

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(1) 6 Q. B. D. 300.

MATHEW L.J. The only question before this Court is whether we are bound in this case to follow the decision in *Reg.* v. *Hutchings.* (1) In my judgment that decision is not applicable to the present case. In the first place, it was a decision under the Public Health Act, 1875, under which the question to be determined was the liability of an individual to pay a certain contribution. It was open to him to make a variety of objections to the course which had been taken in the proceedings which ended in what was in effect a claim to recover from him his contribution. In the Queen's Bench Division (2) it was held that an adjudication in proceedings under the Public Health Act, 1875, s. 150, that a street was a highway repairable by the inhabitants at large, prevented the question being raised in subsequent proceedings in respect of the same street, and was binding in those proceedings. When the case came before the Court of Appeal this decision was overruled. One ground of the decision appears from Lord Selborne's judgment to be that there could be no estoppel as to persons who though interested had not had an opportunity of being heard. Another ground appears to have been the character of the street, and the effect of an estoppel against the Crown or an urban authority in preventing a claim for payment of the defendant's quota of any other expenses of a like character afterwards incurred in respect of the same street. In such a case, as the Lord Chancellor pointed out, the adjoining landowners, who were not parties or privies to the former proceeding, might be deprived of their statutable right to have a just rateable contribution from the defendant to future expenses. It is clear that under the procedure provided by the Public Health Act, 1875, finality in certain cases was impossible. The Act of the Wakefield Corporation and the public Act of 1892 appear to me to be intended to prevent such a case as the present from being governed by the decision in *Reg.* v. *Hutchings.* (1) A mode of procedure is provided by which certain questions are to be determined once for all; and in a second proceeding between the same parties, namely, the local authority on the one side and all persons interested on the other, the previous determination as to the status of a street, on which liability or non-liability depends, is, in my judgment, binding.

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(1) 6 Q. B. D. 300.

(2) 5 Q. B. D. 353.

I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parker & Co., for C. J. Hudson, Wakefield.*

Solicitor for respondents: *S. F. Taylor, for J. B. Cooke, Wakefield.*

A. M.

1903
Jan. 17, 20.

THOMPSON & SONS *v.* THE NORTH EASTERN MARINE ENGINEERING COMPANY, LIMITED.

Employer and Workman—Compensation—Amount fixed by Agreement—Right to Indemnity from Person Liable—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 6.

Sect. 6 of the Workmen's Compensation Act, 1897, provides that where the injury for which compensation is payable under the Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of it, the workman may, at his option, "proceed, either at law against that person to recover damages, or against his employer for compensation under this Act . . . . and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person":—

Held, that the section applied where the compensation was paid under an agreement made between the injured workman and the employer after notice of the accident and of the claim for compensation had been given by the workman to the employer, but before any further proceedings had been taken.

Further Consideration before Kennedy J.

The action was brought for a declaration that the plaintiffs were entitled to be indemnified by the defendants against the liability incurred by them under the Workmen's Compensation Act, 1897, for compensation for personal injuries to a workman named William Archbold on December 5, 1901, and for the repayment of the moneys paid by the plaintiffs in respect thereof.

It appeared that the plaintiffs were shipbuilders at Sunderland,

land on December 5, 1901, were engaged in repairing the steamship *Lindisfarne* in the River Wear Dock. The defendants, who were builders of marine engines, were engaged at the same time and place in repairing the boilers of the steamship. One of the defendants' servants allowed a bag of coke to fall into the hold of the vessel, where it struck and injured Archbold, who was a workman employed by the plaintiffs.

Archbold gave notice of the accident to the plaintiffs, and on December 23 he claimed compensation from the plaintiffs in respect of it. On December 28 the plaintiffs agreed verbally with Archbold to pay him the sum of 19*s*. 2*d*. per week as compensation under the Workmen's Compensation Act; and a memorandum of this agreement was duly sent to the registrar of the county court, and recorded by him in accordance with the eighth provision of the 2nd schedule to the Act. The plaintiffs had continued to pay Archbold 19*s*. 2*d*. a week under this agreement, and had taken receipts from him as for compensation paid under the Act. They now sought to be indemnified by the defendants under s. 6 of the Act. (1) It was admitted that no notice of the accident to Archbold nor any claim to indemnity in respect of it had been given to or made upon the defendants until April 19, 1902, nor had the plaintiffs taken any proceedings under rule 19 of the Workmen's Compensation Rules, 1898, and that if Archbold was entitled to compensation under the Act, then the proper amount was 19*s*. 2*d*. per week, and also that the plaintiffs were the occupiers of the dock within the meaning of the Act. At the trial, which took place at the Leeds Assizes, the only question left to the jury was whether Archbold was injured by the negligence of the defendants or their servants. The jury answered this question in the affirmative, and Kennedy J. adjourned the case for further consideration.

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(1) By s. 6 of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

Scott Fox, K.C., and *Adair Roche*, for the plaintiffs. All the provisions of s. 6 of the Workmen's Compensation Act, 1897, have been fulfilled, and the plaintiffs are therefore entitled to indemnity from the defendants. The Act contemplates that the amount of compensation may be settled by agreement: s. 1, sub-s. 3. The Workmen's Compensation Rules, 1898, 19 to 23, do not affect the matter, as they are only framed with regard to an arbitration. By giving notice of the accident and making a claim on the plaintiffs Archbold "proceeded" within the meaning of s. 6. In *Field* v. *Longden* (1) Stirling L.J. said that proceedings commence when notice of the accident and of a claim is given; but this must be read in the light of the decision of the House of Lords in *Powell* v. *Main Colliery Co.* (2), that the word "proceedings" in the Act is not to be confined to its strictly technical meaning. An agreement under the Act has been held to be a proceeding by Jelf J. in *Oliver* v. *Nautilus Steam Shipping Co.* (3)

[They also cited *Little* v. *McLellan* (4); *Beckley* v. *Scott.* (5)]

Manisty, K.C., and *Shortt*, for the defendants. Money paid under an agreement is not compensation paid under the Act, and s. 6 has therefore no application. There was here no "proceeding" under the Act. The notice of the accident and the claim for compensation are preliminary steps to the proceedings, and are not in themselves proceedings: *Field* v. *Longden* (1); *Perry* v. *Clements.* (6) "Proceed" in s. 6 means proceed for the recovery of compensation in the manner prescribed by the Act, and the section does not contemplate an agreement in settlement of the workman's claim. A mere claim for compensation is not a "proceeding." Where the employer has chosen to settle the matter by agreement he has waived his right to indemnity. If he had chosen to let the proceedings go on, the third party would have had a right to notice and to appear at the arbitration under the Workmen's Compensation Rules, 1898, 19 to 23: *Appleby* v. *Horseley Co.* (1) Here compensation was paid under the agreement and not under the Act, and the third party, who was unaware of the agreement, had no power to interfere. Great hardship will result if it is to be held that an employer may agree with the workman as to his claim for compensation, and then be indemnified for whatever he has chosen to pay. There is no power for the third party in such a case to inquire into the reasonableness of the amount, nor can he get the matter reviewed. He might be bound, if the employer and workman had come to a collusive agreement, to indemnify the employer where the sum paid to the workman was altogether unreasonable. A clear distinction is apparent throughout the Act between compensation paid under an agreement and compensation paid under the Act—that is to say, fixed by arbitration under the Act—and it is only in the latter case that s. 6 enables the employer to get an indemnity.

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(1) [1902] 1 K. B. 47.

(2) [1900] A. C. 366.

(3) Cardiff Assizes, July 31, 1902; not reported.

(4) (1900) 2 F. 387.

(5) K. B. Div. Ireland, Jan. 23, 1902; not reported.

(6) (1901) 17 Times L. R. 525.

Scott Fox, K.C., replied.

Cur. adv. vult.

Jan. 30. KENNEDY J. In this case the action was brought for the purpose of recovering from the defendants certain moneys which have been paid, and for a declaration for an indemnity in respect of moneys to be paid by the plaintiffs to one Archbold, who was a workman in the plaintiffs' employment, and who had made a claim against the plaintiffs in regard to injuries which he had sustained while in their employment, which claim the plaintiffs had satisfied by weekly payments made and to be made under an agreement between themselves and the workman. The action came on for trial before me at the last assizes at Leeds, and one question of fact and one only was left to be determined by the jury, namely, whether or not Archbold had been injured by the negligence of the defendants or their servants. All other questions were left to me, and that question was decided by the jury in favour of the plaintiffs.

(1) [1899] 2 Q. B. 521.

The jury found that the injury in respect of which compensation was being paid by the plaintiffs to Archbold was an injury caused by the negligence of the defendants' servants.

The case arises under s. 6 of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), which runs thus: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

Now, the claim of the plaintiffs here is for indemnity against the defendants, and certain things are clear. First, the injury which Archbold suffered was an injury for which he had a right of compensation from the plaintiffs, his employers; also under the finding of the jury the circumstances were such that the defendants were under a legal liability to pay to Archbold damages in respect of the injury which was caused by the negligence of their servants. The question on which I reserved my opinion is whether or not what has been paid to the injured man, and also the sums which the plaintiffs are still liable to pay to him under the agreement, are sums which fall under the head "Compensation paid under this Act" within the meaning of s. 6, so that the plaintiffs are entitled to an indemnity from the defendants.

The material facts of the case may be shortly stated. Archbold was working in the plaintiffs' employment on the ship *Lindisfarne* in December, 1901. The plaintiffs were unquestionably in the position of persons employing him under the Act. The defendants were doing work on the same ship in regard to the repair of the engines, and one of their servants negligently let a heavy weight fall on the head of Archbold while he was at work in the hold. On December 23, after receiving the injury, he made a claim in respect of it upon the plaintiffs, and on December 28 a verbal agreement was made by the plaintiffs' representative with Archbold to pay him a sum for compensation, and, according to the admitted facts in the case, it is agreed that the amount which was then verbally promised is a proper sum so far as the weekly rate of Archbold's wages is concerned. From that date up to the present time the plaintiffs have continued to pay that sum as compensation to Archbold. On April 19, 1902, the plaintiffs made a claim on the defendants in respect of this money. On August 30 they issued the writ in the present action. After the commencement of the action a written memorandum was duly filed, in the manner prescribed by the Act, embodying the agreement, and stating that the compensation was paid under the Act and in accordance with the provisions of the Act. Receipts for the weekly payments signed by Archbold state that the compensation was paid under the Workmen's Compensation Act, 1897.

The defendants contend that the plaintiffs can only be reimbursed for any compensation paid in "proceedings" taken against them by the workman, and that no "proceedings" have taken place here. No doubt apparent colour is given to that view by the circumstance that this section, which gives the right to the indemnity, uses the words in its earlier part, "proceed either at law against that person . . . . or against his employer for compensation." That, no doubt, gives some colour for the contention that the proceeding against the employer is intended to be of the same character as the proceeding, i.e., a legal proceeding, against the person causing the injury. Further, there is this consideration—that the agreement in respect of which the indemnity is now sought is an agreement made voluntarily by the employer with the workman without any sanction or acquiescence on the part of the defendants, and without any pressure from the Court. The difficulty that unfortunately arises here is due to the use of the words "proceed" and "proceedings" in the Act in more than one sense—a difficulty which has caused one case at any rate to be taken to the House of Lords. It is impossible after the decision in that case not to hold that the words "proceed" and "proceedings" are used in the Act in different senses. The word "proceedings" in sub-s. 3 of s. 1 of the

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Act has been decided by the House of Lords to be not used in a technical but in a non-technical sense. In *Powell* v. *Main Colliery Co.* (1) the Lord Chancellor said: "It has been admitted by all the learned judges, I think, who have taken a different view from that which I propose to place before your Lordships for acceptance, that the word 'proceedings' is used in a sense different from that which would describe legal procedure ordinarily." Passing, however, from that section, where the meaning of the word has by this decision been authoritatively explained, we find the word "proceedings" used again in sub-s. 1 of s. 2 of the Act: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and . . . . unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident. . . ." In that section, therefore, the word "proceedings" seems to be used in its technical sense; and on reading the section it certainly looks as if the notice of the accident and the claim for compensation were steps which were not themselves "proceedings," but conditions precedent to the maintenance of any "proceedings," so that the actual proceedings do not commence until after those steps have been taken. On the other hand, it has been pointed out that there is a dictum of Stirling L.J. in *Field* v. *Longden* (2) which is, of course, entitled to the very greatest respect, and which appears to express the view that the beginning of "proceedings" under the Act is constituted by the notice of accident and the claim. The Lord Justice in the course of his judgment says (3): "The proceedings commence when notice of the accident and of a claim is given." It is by no means easy, therefore, to feel sure what meaning ought to be given to the word "proceed" in s. 6. That is, no doubt, a very important question, which will have some day to be settled, because if a workman has exercised the option given him by the first part of the section, and has "proceeded" against either his employer or the person liable, it is clear that he is barred from afterwards proceeding against the other. It will have to be decided whether a man who has given notice of the accident and has claimed has thereby "proceeded," or whether he has not "proceeded," till he has taken the next step. That seems to me a serious question, and it is one which I do not desire to dwell on now, for to my mind this case must be decided on the wording of the last part of the section. In a recent case tried at Cardiff by my brother Jelf (1), of which a shorthand note has been furnished to me, money appears to have been paid to and accepted by the workman without any formal agreement, but after examination by the employers' doctor and as compensation, and the workman then sought to enforce by action at law his remedy against the person liable; and Jelf J., after giving the case the fullest consideration, came to the conclusion on the facts that what had passed between the workman and his employers amounted to a "proceeding" within the section, and so barred the workman from seeking to enforce a remedy by action against the person liable. There is also an earlier decision on the Act by Ridley J. (2), which is very shortly reported, but which decides that mere notice of the accident is not a proceeding within the meaning of the section. There is no other case directly in point. The Irish and Scottish cases which have been cited and which have a bearing on the question I shall not discuss, because I do not think it is necessary for me to decide this point in this case. For the purpose of my decision in this case it is sufficient to say that, so far as authority goes, I do not think, if it were necessary to decide the point, that anything bars me from holding that the word "proceed" is sufficiently satisfied by a claim for compensation being made under the Act, as was done here. But the decisive words in this case are, as it seems to me, "if compensation be paid under this Act," in the latter part of the section. Now, is such a payment as has been made here under the agreement

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(1) [1900] A. C. 366, at p. 370.

(2) [1902] 1 K. B. 47.

(3) [1902] 1 K. B. at p. 55.

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(1) *Oliver* v. *Nautilus Steam Shipping Co.*, Cardiff Assizes, July 31, 1902; not reported.

(2) *Perry* v. *Clements*, 17 Times L. R. 525.

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within those words? I think that I must hold that it is. If it is not paid under the Act, why and how is it paid? It is clearly part of the scheme of the Act that the parties may agree, and agreement is one of the modes of settlement under the Act. This is plain from sub-s. 3 of s. 1, which provides for any question being settled by arbitration "if not settled by agreement." If that is so, I cannot make the words depend on the word "proceed" in the earlier part of the section in such a way as to make the workman's decision in the exercise of the option given him by the section the test by which I ought to judge whether or not there is compensation under the Act for which the employer who pays it is entitled to be indemnified. If it is paid under the Act, the section says that the employer is entitled to be indemnified. I agree that it is not the same thing to indemnify an employer for an amount which he has settled by agreement with the workman and where the amount has been settled by the judge in the course of the legal proceedings which may follow a claim. It has been suggested that the agreement might be a collusive one, so that more compensation might be given to the workman than the Act would allow, or, at any rate, more than the judge would have given; and it is contended that it would not be fair to compel an indemnity in respect of such an amount. I feel the weight of that argument. Would it be open to the party from whom the employer seeks indemnity in either of the suggested cases, where a jury has found that he is to blame for the injury to the workman, to open the question of the liability of the employer, or the reasonableness of the amount of the compensation paid by the employer? Difficulties undoubtedly exist. I think that some defences must be open to the party from whom indemnity is claimed, as they would be in the case of an award where the employer has not availed himself of the provisions of rules 19 to 23 of the Workmen's Compensation Rules, 1898. Those rules provide for notice of the arbitration being given to the person from whom the employer claims an indemnity, so that he may if he pleases appear before the Court; and it is provided that if he does not appear he is to be deemed to admit the validity of the award as to any matter which the judge has jurisdiction to decide in the arbitration, "whether such award is made by consent or otherwise." Where, however, the amount of compensation is fixed by a voluntary agreement and not by any award, as is the case here, the third party has no chance of interposing, and it must, I think, remain open to him to contend in answer to the claim for indemnity, not only that the injury to the workman was not caused by his fault, but also that the compensation is not paid under the Act if the amount is, in fact, greater than the amount permitted by the Act; or that the employer here was not liable to pay compensation under the Act; and, further, I think he may also say that, although the amount of compensation fixed by the agreement is compensation paid under the Act—since the employer was liable and the amount is within the limits set by the Act—yet still it is not an amount which it was reasonable for the employer to agree to pay, having regard to the nature of the injury and the condition and circumstances of the workman. I think he would be entitled to ask the jury to say what would be a reasonable amount of compensation for the employer to have agreed to pay. In the present case, owing to the agreed admissions of facts, no complications of the kind arise.

One other consideration, to which the defendants' counsel has called my attention, has to be noticed. Happily, in some cases the workman recovers from the accident, and the Act in contemplation of that provides for a right of review of the amount of compensation; but while giving to the person entitled to the indemnity the right of having the man examined, it has not, so far as I can see, given to the person liable to pay the indemnity—except only in the case of insurers—the right to have the amount payable for compensation reviewed. It has been contended, therefore, that such a person might be liable on his indemnity, even after the workman was quite well, if the employer chose to go on paying him compensation under his agreement. The answer, I think, is that, according to the general law of indemnity, the person indemnifying could in such a case compel the employer to let him use his name in any proceedings to enforce a review.

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Further, as it seems to me, the party who indemnifies for compensation paid under an agreement between employer and workman is, in this respect, no worse off than one who indemnifies in respect of compensation paid under an award. Be that as it may, I cannot, merely because of these suggested difficulties, construe the section in any other way than according to the natural meaning of the words of the section; and I feel bound to hold that an agreement to pay compensation being one of the methods contemplated by the Act, payment under such an agreement is payment of compensation under the Act, and the plaintiffs' right to indemnity from the defendants follows. Further, as I have said, if it were necessary to decide the point, I should be prepared to hold that there had been here a "proceeding" against the plaintiffs under the first half of s. 6. I therefore give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell & Roche, Sunderland.*

Solicitors for defendants: *Johnson, Weatherall & Sturt, for J. G. & T. Marshall, Sunderland.*

A. P. P. K.

In re LAKE.
Ex parte HOWE TRUSTEES.

1903
Jan. 12.

Bankruptcy—Trustee—Breach of Trust—Unauthorized Investment—Contributory Mortgage—Bankruptcy of Trustee—Proof against Bankrupt's Estate—Valuing Security—Measure of Damages—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 168, *and Sched. II.*, *rr.* 9–16.

L., a trustee, advanced trust funds on a contributory mortgage, which was an unauthorized investment. He afterwards became bankrupt. The mortgagor commenced an action against L., and all others claiming through or under him, to set aside the mortgage on the ground of fraud. L.'s cestuis que trust compromised their claims in the action without the concurrence of L.'s trustee in bankruptcy:—

Held, that, as L.'s cestuis que trust had adopted the improper investment, they could not under the circumstances prove in L.'s bankruptcy for the whole amount of the trust fund, but that their remedy was a proof for the damages the trust estate had sustained by reason of the improper investment, and that the measure of damages was the difference between the total sum invested and the assessed value of the amount receivable under the compromise.

The dictum of Kekewich J. in *In re Salmon*, (1889) 42 Ch. D. 351, at pp. 356–8, as to the relative rights of trustee and cestui que trust, where the trustee makes an improper investment, applied.

In 1892 B. G. Lake, a solicitor and a member of the firm of Lake & Lake, was one of the trustees of the marriage settlement of a Mr. and Mrs. Howe, and from that time the active management of the trust was in his hands, and his said firm acted as solicitors to the trust. In 1898 a sum of 5500*l.*, part of the Howe trust funds, was received by B. G. Lake or his firm, and was placed on deposit at a bank, not in the name of of the firm, but in the names of B. G. Lake and his partner G. E. Lake, and ear-marked "Howe Trust." The books of the firm shewed various dealings with this trust fund during 1898 and 1899, but in the autumn of 1899 it appeared to have been advanced by B. G. Lake with moneys of other clients to a Mr. Cavendish on the security of a contributory mortgage taken in the names of Cox and Hurst, two of the clerks in the employ of the firm. On the 14th of October, 1899, Cox and Hurst issued a certificate to B. G. Lake stating that 5500*l.* of the moneys secured by their mortgage belonged to the Howe trust, and they issued similar certificates to other parties. In November, 1899, G. E. Lake died, and the business of the firm was carried on by B. G. Lake as surviving partner until June, 1900, when he became bankrupt, and in July, 1900, new trustees of the Howe trust were appointed in the place of B. G. Lake and another party. In October, 1900, Mr. Cavendish commenced an action of *Cavendish* v. *Lake* against B. G. Lake and his trustee in bankruptcy, the present Howe trustees, and all the other parties interested in the contributory mortgage held by Cox and Hurst, claiming to set aside that mortgage on the ground of fraud. In July, 1902, the Howe trustees entered into an agreement with Mr. Cavendish by which they compromised their claims in the action of *Cavendish* v. *Lake* for a sum of 500*l.*, and a possible further payment of 1500*l.* in certain events. This compromise was made without the concurrence of Lake's trustee in bankruptcy. The Howe trustees then claimed to prove against the joint estate of the firm and the separate estate of B. G. Lake for the whole 5500*l.*, and their proofs were rejected by the trustee in bankruptcy on the grounds (1.) that they ought to have valued their security, and (2.) that they ought not to have compromised their claims without his consent. The Howe trustees appealed.

Muir Mackenzie and *F. G. Champernowne*, for the Howe trustees. The entries in the books of the firm cannot be relied upon. The money was in truth misappropriated, and the Howe trustees are entitled to prove for the whole 5500*l.* against both the joint and separate estate so long as they do not receive more than 20*s.* in the pound on the whole: *In re Parkers.* (1) But if the money was invested on the contributory mortgage, it was an unauthorized security and a breach of trust, and they are entitled to maintain their proofs against both estates. The principle of *Ex parte Biddulph* (2) is directly in point. As to valuing the security: they are not obliged to value it at all. Under s. 168 and Sched. II., rr. 9–17, of the Bankruptcy Act, 1883, it is only property of the debtor on which a creditor

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(1) (1887) 19 Q. B. D. 84.

(2) (1849) 3 De G. & S. 587.

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holds security that has to be valued and deducted on a proof: *In re Turner.* (1) The contributory mortgage was obviously not a security on Lake's property.

Younger, K.C., and *Northcote,* for the trustee in bankruptcy. The money was not misappropriated, and therefore *In re Parkers* (2) does not apply. The books of the firm shew that the money was paid into an account at a bank in the names of the two individual partners and ear-marked, and dealt with in favour of Cavendish. It may be admitted that it was advanced on a contributory mortgage which was an unauthorized security. This is in fact a claim for trust funds, not misappropriated, but improperly invested, and the rule of equity that is applicable between a cestui que trust and a trustee who has made an improper investment is laid down by Kekewich J. in the cases of *In re Salmon* (3) and *Head* v. *Gould* (4), and should be applied here. The Howe trustees, therefore, cannot prove for the whole 5500*l.* and at the same time retain the security. If they prove for the whole 5500*l.* they must transfer the security to Lake's trustee in bankruptcy. They cannot do that, because they have realized it under their compromise, and they ought not to have compromised without notice to or the concurrence of Lake's trustee. The only claim now open to the Howe trustees is in damages for the improper investment, and they must assess the value of the security they have taken to and only prove for the balance of the loss they have sustained. But assuming this to be wrong, they are nevertheless bound to value their security, because—on the theory that it was an improper investment which the trustee must take to—it is really a security belonging to Lake's estate on which they have a lien until the trust fund is made good.

Muir Mackenzie, in reply. If Lake were solvent the case of *In re Salmon* (3) might apply, but the principle of that decision does not apply, because a proof is not payment. The distinction between a solvent and bankrupt trustee is pointed out in *Ex parte Biddulph.* (5)

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(1) (1881) 19 Ch. D. 105.

(2) 19 Q. B. D. 84.

(3) 42 Ch. D. 351, at pp. 356–8.

(4) [1898] 2 Ch. 250.

(5) 3 De G. & S. 587.

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WRIGHT J. It seems to me, upon the facts of this case, that there is no real difference between the separate estate and the joint estate for the purposes of these proofs. On the point whether the security held by the Howe trustees should have been valued, I agree with Mr. Mackenzie that the general rule in bankruptcy is that a security, which is not upon any part of the debtor's property, need not be valued by a creditor when making his proof; but I think the rule does not apply in the present case. Now the substance of the case is this—was the 5500*l.* ever invested at all? That is to say, was it misappropriated or was it invested on an unauthorized security? If it was misappropriated, it seems to me that the principle of *In re Parkers* (1) would apply, and that the trustee would have no answer to these proofs against the joint and separate estate. But I think on the evidence that there was an investment of this money. The tenor of all the documents point to this conclusion, and it seems to me incredible that there was no advance of this money to Cavendish. It was kept separate in the books of the firm with a certain amount of elaborateness, and ear-marked to Cavendish or to some one for him, and in a case of this kind it would be wrong to hold, without clear proof, that all the entries were fictitious. If, then, the money was paid over to or on account of Cavendish, as I think it was, on the security of a contributory mortgage, which is admittedly an unauthorized investment, then comes the question raised by Mr. Younger whether the trustees of the Howe settlement have not adopted the investment and, by compromising their claims in the action of *Cavendish* v. *Lake*, have given up their right to prove in the present form. It seems to me, as pointed out by Kekewich J. in the case of *In re Salmon* (2), that there is a general rule in equity that where trust funds have been invested on a security, which is not merely insufficient but of a description not authorized by the trust, the trustee should have the opportunity or option of taking to the improper security on replacing the trust fund; and I am unable to see why, if the trustee becomes bankrupt, his trustee in bankruptcy should not have the same right. It seems to me that there is

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(1) 19 Q. B. D. 84.

(2) 42 Ch. D. 351, 356–8.

1903

LAKE, *In re.*
HOWE TRUSTEES, *Ex parte.*

Wright J.

no distinction in point of principle between the two cases. I hold, therefore, that the Howe trustees, when they compromised with Cavendish without consulting the trustee in bankruptcy, disentitled themselves from proving in the way that they have done. I can see no good reason, however, why a proper proof should not be made for the damages that the Howe trust has sustained by reason of the improper investment, and on such a proof being made evidence must be given as to the value of the agreement of compromise that was executed on July 10, 1902, and the measure of damages will be the difference between the 5500*l.* and the assessed value of the document of compromise. As to B. G. Lake, he was one of the Howe trustees, and a proof for damages can be made against his separate estate; but primâ facie there is no right to prove for damages against the joint estate of the firm, unless it should appear that the firm have so acted as to make themselves liable for the breach of trust. The proofs that have been made must be disallowed, but without prejudice to a fresh proof for damages.

Solicitors for the Howe trust: *Wigan, Champernowne & Co.*
Solicitors for trustee in bankruptcy: *Leigh & Pemberton.*

H. L. F.

1903
Jan. 21, 22, 23.

THE KING *v.* LYNCH.

Criminal Law—High Treason—Practice—Motion to quash Indictment—Expatriation in Time of War—Naturalization Act, 1870 (33 *&* 34 *Vict. c.* 14), *s.* 6.

On a trial for high treason the Court will not entertain a motion to quash the indictment as defective, but will leave the prisoner to his remedy by motion in arrest of judgment or by writ of error.

The Naturalization Act, 1870, provides by s. 6 that "Any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien":—

Held, that the section does not empower a British subject to become naturalized in an enemy State in time of war; and that the act of becoming naturalized under such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy.

TRIAL at bar for high treason.

The first count of the indictment charged that upon January 18, 1900, and long before and continually from thence until the death of the late Queen Victoria, an open and public war was being carried on by the Government and burghers of the South African Republic against the said Queen and her subjects, and that the prisoner on January 18, 1900, at Pretoria, in the territory of the South African Republic, without the realm of England, and at divers other times and at other places within the said South African Republic, was adhering to, aiding, and comforting the Government of the South African Republic and the burghers and men of the said South African Republic under the said Government, enemies of the late Queen Victoria, the overt acts being laid in the South African Republic. The first of the overt acts charged was a declaration made by the prisoner during the continuance of the war between the South African Republic and Great Britain in the following terms:—

"In terms of First Volksraad resolution dated 29 September, 1899. Art. 1442.

"I the undersigned Arthur Alfred Lynch, up to the present an Irishman (British subject) born in Australia, inhabitant of the South African Republic since . . . . 5 days, hereby declare my willingness to take up arms for this Republic in order to maintain and defend its independence, which now is or in the future may be threatened, and therefore desire to take the oath of allegiance as a full burgher of the South African Republic.

"Signed at Pretoria on the 18th of January, 1900.

"(Signed) Arthur Lynch."

The second of the overt acts charged was the taking of an oath of allegiance to the enemy during the war in the following terms :—

"Oath.—I Arthur Alfred Lynch, up to the present an Irishman (British subject) born in Australia, desiring to become a fully enfranchised burgher of the South African Republic in terms of the Hon. First Volksraad's resolution, art. 1442, dated 29 September, 1899, swear (or solemnly declare that the taking of an oath is not allowed by my creed and solemnly promise) in all sincerity that I will be faithful to this State, will respect and support its independence, will submit to the 'Grondwet' (1) and other laws and lawful authorities of the country, and will in every way conduct myself as becomes a faithful burgher of the State.

"So truly help me God Almighty
"(Or that I promise solemnly),
"(Signed) Arthur Lynch."

The count also charged various other overt acts of treason committed during the said war, amongst others, that the prisoner departed from Pretoria on March 1, 1900, with intent to join the enemy in Natal; that on March 22, 1900, he published an address to Irishmen, inciting them to assist the enemy; that he procured or attempted to procure horses and wagons for the military service of the enemy; and that he commanded an armed body of men called the Second Irish Brigade with intent to co-operate with the military forces of the enemy.

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(1) Constitution.

The second count charged that the prisoner on March 3, 1900, at Glencoe, in the British Colony of Natal, without the realm of England, and at divers other times and places within the said Colony, was adhering, &c., as in the first count, the overt acts being acts committed in Natal, and including actual fighting by the prisoner on behalf of the enemy against the British troops.

The third count charged that the prisoner on January 18, 1900, at Pretoria, without the realm of England, and at divers other times and places within the South African Republic, was adhering to the Government of the Orange Free State and the burghers and men of the said Orange Free State under the said Government, enemies of the late Queen Victoria; the overt acts being charged as committed in the South African Republic with intent to assist the Government of the South African Republic and the burghers and men of the South African Republic under the said last-mentioned Government, allies of the said enemies of the late Queen Victoria, and being the same overt acts as those mentioned in count 1.

The fourth count charged that the prisoner, at divers times and places within the British Colony of Natal, without the realm of England, was adhering, &c., as in the third count, the overt acts being the same as those mentioned in count 2.

Sir R. B. Finlay, *A.-G.*, *Sir E. Carson*, *S.-G.*, *H. Sutton*, *C. W. Mathews*, *Guy Stephenson*, and *Graham Campbell*, appeared for the Crown.

Shee, *K.C.*, *Avory*, *K.C.*, *Biron*, and *Dwyer*, appeared for the prisoner.

Before the prisoner pleaded to the indictment, *Avory*, *K.C.*, on his behalf, moved to quash the indictment on the ground that each count charged an adhering to the enemy without the realm, and therein disclosed no offence under the Treason Act of 25 Edw. 3, stat. 5, c. 2, which provides, so far as is material to the present case, that it shall be adjudged to be treason "if a man do levy war against our Lord the King in his realm or be adherent to the King's enemies in his realm giving to them aid and comfort in the realm or elsewhere."

Sir R. B. Finlay, A.-G., for the Crown. It is not the practice in cases of treason for the Court to entertain an objection to the sufficiency of the indictment upon a motion to quash. In Com. Dig., tit. "Indictment," H, it is said: "A defective indictment may be quashed upon motion; . . . . but not in an enormous crime as for treason or felony." In Hawkins P. C., bk. ii. c. 25, § 146, the author says: "I take it to be settled that by the common law the Court may in discretion quash any indictment for any such insufficiency, either in the caption or the body of it, as will make any judgment whatsoever given upon any part of it against the defendant erroneous. Yet it seems that the judges are in no case bound ex debito justitiæ to quash an indictment, but may oblige the defendant either to plead or demur to it. And this they generally do where it is for a crime of an enormous or public nature, as perjury, forgery, sedition, nuisances to the highways, and other offences of the like nature." In East's Pleas of the Crown, vol. i. p. 110, the practice is stated thus: "It has not at any time been usual to quash indictments for high treason, though it may be done. And though the Act states that exceptions, grounded on those mistakes, must be taken before evidence be given, it does not therefore follow that the defendant may take such exceptions at any time before." The Act there referred to is 7 Will. 3, c. 3, an Act for regulating the mode of trials for high treason, which, by s. 9, provides that "No indictment for any of the offences aforesaid, nor any process or return thereupon shall be quashed on the motion of the prisoner or his counsel for mis-writing, mis-spelling, false or improper Latin, unless exception concerning the same be taken and made in the respective Court where such trial shall be by the prisoner or his counsel assigned before any evidence given in open Court upon such indictment; nor shall any such mis-writing, mis-spelling, false or improper Latin, after conviction on such indictment be any cause to stay or arrest judgment thereupon, but nevertheless any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error, in the same manner and no other than as if this Act had not been made." Then the author goes on: "The practice remains as it was at common law; and the construction upon this Act has been conformable thereto, that they must be taken before plea pleaded; and accordingly in the several cases of Vaughan, Sullivan, and Layer, the Court refused to hear such exceptions after plea; though it is still open to the prisoner afterwards to move in arrest of judgment." In Chitty's Criminal Law, 2nd ed. vol. i. p. 300, it is stated, with reference to the quashing of an indictment that "When the motion is made on the part of the defendant, the rules by which the Court are guided are more strict, and their objections are more numerous; because if the indictment be quashed the recognizances will become ineffectual; and the Courts usually refuse to quash on the application of the defendant when the indictment is for a serious offence, unless upon the clearest and plainest ground, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error. It is therefore a general rule that no indictments which charge the higher offences as treason or felony . . . . will be thus summarily set aside." In *Rex* v. *Johnson and Others* (1), where there was a motion to quash an indictment against six persons for entering a lead mine and carrying away lead, it was resolved that the defendants were not entitled to any indulgence from the Court, "therefore the defendants may demur if they think fit, for it is in the discretion of the Court whether they will quash any indictment whatever upon motion." In *Reg.* v. *Heane* (2), where the defendant was charged under the Naval Discipline Act, 1861, with having given false evidence before a court-martial, the indictment having been removed by certiorari into the Queen's Bench, the defendant moved to quash the indictment. Cockburn C.J. said: "Whether the offence here charged is perjury within the meaning of that statute is a matter of serious doubt, and we ought not in the exercise of our discretion to quash this indictment, and so preclude the prosecutor

(1) (1752) 1 Wils. 325.

(2) (1864) 4 B. & S. 947.

from the advantage of obtaining the judgment of a Court of Error. In *Reg.* v. *Sheares* (1), a case of a trial for high treason in Ireland, on a motion to quash the proceedings on the ground of the alienage of one of the grand jurors by whom the bill was found, Lord Carleton said, at col. 266: "In cases of crimes of great magnitude the Court does not usually quash an indictment at the instance of the prisoner, but he is put to his demurrer or his plea. If you have any plea you must put it in."

Avory, K.C., in reply. The authorities relied upon by the Crown, with the exception of *Reg.* v. *Heane* (2), date from a remote period; they are the relics of a barbarous time, when the more serious the offence the less was the opportunity given to the prisoner to make his defence to the charge, and should not be regarded by the Court as authorities at the present day. Those authorities, indeed, concede that the Court has a discretion to quash the indictment upon motion, and it is contended that, if the defect apparent upon the face of it is so great that no judgment could be pronounced upon it, the Court ought to exercise its discretion in favour of quashing it.

LORD ALVERSTONE C.J. If the authorities relied upon by the Attorney-General in answer to this motion could fairly be described as relics of barbarous times which have been swept away by modern legislation and procedure in favour of prisoners, it may be that we should be entitled to disregard them. But, in my opinion, the description given of them is not correct. It is true that trials for high treason have not been so numerous during the last century as in earlier times, but that fact does not in any way lessen the weight of the authorities that have been cited. In my view it is within the discretion of the Court whether they will entertain the objection to the indictment at the present stage, and the refusal of the Court to entertain it now will not deprive the prisoner of the opportunity of taking the objection at a later stage, and having it decided by a tribunal of greater authority than that which is sitting here. In my view the contention of the Attorney-General is founded

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(1) (1798) 27 State Trials, 255.

(2) 4 B. & S. 947.

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on good sense. It is true that in the present case the motion to quash is made before a Court of three judges, but the circumstances are exceptional. In ordinary cases the motion to quash would be made before a single judge, and the point raised could not be decided with the same authority as if it were taken upon a motion in arrest of judgment or upon a writ of error. And rules of practice are designed to meet the cases that most frequently arise. The motion must be refused.

Motion to quash refused.

The prisoner then pleaded not guilty, and proof was given of the several overt acts set out in the indictment.

The resolution of the First Volksraad of September 29, 1899, mentioned in the indictment, consisted of the approval by the First Volksraad of a resolution of the Executive Council of even date, which was in the following terms:—

"Resolution of the Executive Council, 1251–99, re discussion concerning the desirability of granting the full franchise to all persons who, although not possessing any or not yet possessing full franchise, shew by taking up arms their readiness to stand next to burghers in defence of the independence of the Republic in the war which now threatens to break out between the Republic and the kingdom of Great Britain and Ireland.

"The Executive Council, taking into consideration that such persons give proofs of their readiness to defend and maintain with our burghers the interest and the independence of the South African Republic, and that the State can rely upon them in the hour of danger or whenever the independence so dear to us is threatened, and thereby already now make themselves useful to the country, *Resolves* to recommend the Honourable the First Volksraad to empower and charge the Government to immediately grant the full franchise to all such persons who desire to become full burghers of the South African Republic in accordance with art. 5 of Law No. 3 of 1899."

The prisoner's letters of naturalization were in the following terms:—

"In terms of the decree of the First Volksraad, article 1442, dated September 29, letters of full naturalization are by these presents in the name of the Government of the South African Republic granted to Arthur Alfred Lynch, born in Australia, hitherto British subject.

"Pretoria, 18th January, 1900.
"F. W. Reitz, State Secretary.
"M. J. De Wet.
"Wd. Heet.
"State Procurator.

"Given out, after being sworn to (1), this 23rd day of January, 1900, by me,

"H. C. De Bruyn Prince, State Clerk."

Shee, K.C., for the prisoner. The prisoner is protected by the provisions of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), from any criminality in respect of the acts charged in the indictment. Having obtained letters of naturalization in the South African Republic, he was no longer a British subject. Before this Act a British subject could not change his nationality either in time of war or of peace. The Act provided by s. 6 that, "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State be deemed to have ceased to be a British subject and be regarded as an alien." The "disability" there referred to is, as appears from the definition clause, s. 17, the ordinary contractual disability of coverture, infancy, and lunacy. The object of the Act was in the main to get rid of the difficulties arising from a double nationality. According to English law, every person born in England, whatever the nationality of the parents may have been, was an English subject; and, secondly, the children of all English subjects born abroad were also English subjects. Thus the child of French subjects born here was by reason of the place of his birth an English subject, but he was also by French law a French subject by reason of his parentage, while a child of English parents born in France or America owed allegiance to this country as well as to the country of his birth. This double nationality in the event of war breaking out between the two countries created a difficulty. In 1870, at the time of the passing of the Act, there were in the United States of America as many as twenty millions of persons who were either the children of emigrants or who had themselves emigrated there and had become naturalized there. These emigrants were largely of British origin, and consequently British subjects. It was the case of these emigrants that the framers of the Act had mainly in view. In the event, however, of war breaking out between the two countries, there would presumably always be a certain number of emigrants resident in the foreign country and intending to become naturalized there, but who had either omitted to apply for letters of naturalization or who had not at the time of the war breaking out resided there for the necessary period required by the law of the foreign country, and who consequently had not yet acquired a double nationality. But it is to be inferred from the wide general language of the section that the Legislature did not intend to make an exception of this class of emigrants, or to exclude them from the privilege of being empowered to throw off their British allegiance which was conceded to the general body of emigrants as a whole: "Any British subject . . . . may at any time . . . . when in any foreign State . . . . become naturalized in such foreign State." The section does not limit the time when the person may become naturalized or require that the relations with the foreign State should be friendly. To interpret the section as demanded by the prosecution it is necessary to read in the words "may in time of peace," or "when in any foreign State not being at war with this country." That the Act was intended to authorize to some extent a change of nationality during time of war is clear from s. 4, which provides that "Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject." It is obvious that that section was intended to apply as well to a time of war as to one of peace, for it is only in time of war that the importance of the declaration arises. But if a declaration of alienage may be made during a time of war under s. 4, why may not equally letters of naturalization be obtained in time of war under s. 6? Then, if the effect of the statute is to protect the prisoner from the consequences of those overt acts which were committed after the grant of letters of naturalization, it must equally protect him in respect of the first two overt acts specified in the indictment, those of making the declaration and taking the oath upon which the letters were granted, for they were practically contemporaneous with the grant of the letters and were part and parcel of one transaction. [He referred to Cockburn on Nationality.]

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(1) This was understood to be a mistranslation. It should have been, "after oath (i.e. of allegiance) taken."

Sir R. B. Finlay, A.-G., for the Crown. A British subject cannot become naturalized in a foreign country during a state of war between that country and Great Britain. For the very act of obtaining letters of naturalization under those circumstances would be a crime, and s. 6 of the Act of 1870 has no application to an act which would itself be criminal. War has the effect of rendering void all contracts between the citizens of one belligerent State and those of the other belligerent if they were entered into in time of war, and of suspending the means of enforcing the contracts if entered into in time of peace: Hall on International Law, 4th ed. p. 405. Thus in *Janson* v. *Driefontein Consolidated Mines, Limited* (1), Lord

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(1) [1902] A. C. 484, at p. 499.

Davey said that it is a rule well established in our common law "that the King's subjects cannot trade with an alien enemy, that is a person owing allegiance to a Government at war with the King, without the King's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation." In *Esposito* v. *Bowden* (1), where to a declaration charging a breach of a charterparty to load a cargo at a Russian port it was pleaded that after the making of the contract war was declared against Russia, and it became impossible to perform the contract without trading with the enemy, Willes J., delivering the judgment of the Exchequer Chamber, said (2): "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law. It is founded upon the jus belli which Lord Coke (Co. Litt. 11 b) states to be a portion of the law of England, adding, 'in republicâ maxime conservanda sunt jura belli.' This force has been attributed to it in, amongst other cases, *Furtado* v. *Rogers* (3), where Lord Alvanley C.J. said: 'We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contracts to do a thing which is afterwards prohibited by Act of Parliament he is not bound by his contract. . . . And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract.'" And if this is the effect of a declaration of war upon a contract of charterparty or marine insurance entered into with the citizen of an enemy State, a fortiori must it be so where the contract is entered into, not with an individual subject of the enemy State, but with the enemy State itself, and is moreover a contract that the British subject will join the enemy State in making war upon Great Britain. Sect. 6 of the Act of 1870 can only be read as relating to naturalization during a state of peace. This subject has been to some extent considered in America. In Halleck's International Law, vol. i. ch. xii. § 29, it is said: "It seems to be a well-settled principle of international law that during the existence of hostilities (flagrante bello) no subject of a belligerent can transfer his allegiance or acquire a foreign domicil by emigration from his own country so as to protect his trade either against the belligerent claims of his own country or against those of a hostile power. In other words his allegiance continues the same, and his native character is unaffected by his change of residence. This doctrine rests on the ground that to desert one's own country in time of war is an act of criminality, and that if a citizen removed to another State his allegiance is still due to his Sovereign, and he is as much bound to abstain from trade with a public enemy as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation by an opposite belligerent. This principle is sanctioned by the most approved writers on international law, and has been expressly affirmed by the Courts of the United States. The doctrine above announced is not in conflict with that contended for by some writers that a citizen has a general right of expatriation in time of peace, and that the assent of his Government to seek change of allegiance and national character is implied in the absence of any prohibition. Nor is it to be construed as denying to a citizen the right to change his allegiance and national character in time of war with the express consent of the State, and with authentic renunciation of pre-existing citizenship. But expatriation in time of war does not result from a change of residence, and the general consent of the State to emigration, which is presumed in time of peace from the absence of any general prohibition. If so it might be appealed to as a mask to cover desertion, or treasonable aid to the public enemy." In Bouvier's Law Dictionary, tit. "Expatriation," it is said: "To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home." In *Duguet* v. *Rhinelander* (1) Senator Gold, delivering the judgment of the majority of the Court of Errors, observed: "Is an emigration" to a neutral State, "which is lawful in relation to the parent State, equally so in reference to the enemy of such State? As a general rule it is so. At the same time, should the citizens of a belligerent power, in concert with the State, or for the purpose of multiplying the warlike resources, or aiding the enterprises of the State, emigrate to and take a stand in a neutral country, in order to mask mercantile projects under a neutral flag, there can be no hesitation in pronouncing such emigration fraudulent, and that an establishment and residence for such unwarrantable purposes cannot acquire to the emigrant a neutral domicil; he would still continue a member of his native family, and as such must participate in and be affected by the fortunes of the parent State." In Duer on Marine Insurance, vol. i. lect. 5, § 35, it is said: "In the United States it appears to be settled law that a native subject cannot acquire a foreign domicil by an emigration from his own country during the existence of hostilities (flagrante bello) so as to protect his trade during the war either against the belligerent claims of his own country or against those of a hostile power. . . . The ground of this doctrine is that there rests upon every subject or citizen a moral obligation not to abandon his country in a time of war without the express sanction of the Government. The personal services and the property of each separate individual are a component part of the national resources on which the Government relies in declaring a war; and to withdraw these when his country may require their aid is a breach of the duty that springs from the necessary relation that each individual bears to the political society of which he is a member." In *Talbot* v. *Janson* (2) Paterson J. said: "Now it is an obvious principle that an act of illegality can never be construed into an act of emigration or expatriation. At that rate treason and emigration, or treason and expatriation, would in certain cases be synonymous terms. The cause of removal must be lawful; otherwise the emigrant acts contrary to his duty, and is justly charged with a crime." And in *The Santissima Trinidad* (1) Story J., delivering the judgment of the Court, said: "Assuming for the purposes of argument that an American citizen may, independently of any legislative Act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear that this cannot be done without a bonâ fide change of domicil under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act." The prisoner's acceptance, then, of letters of naturalization in the South African Republic was under the circumstances a criminal act of treason and void, and being void cannot afford any justification for the subsequent overt acts charged in the indictment.

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(1) (1857) 7 E. & B. 763.

(2) 7 E. & B. at p. 781.

(3) (1802) 3 B. & P. 191, at p. 198; 6 R. R. 752.

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(1) (1802) 2 Joh. Cas. 476, at p. 478.

(2) (1795) 3 Dallas Rep. 133, at p. 153.

But even if this were not so, it cannot in any view justify the two first charged overt acts—the declaration of willingness to take up arms on behalf of the enemy, and the oath of allegiance to the enemy—for by the very terms of the resolution of the First Volksraad of September 29, 1899, they are conditions which have to precede the grant of naturalization, and cannot be regarded as part of the transaction of naturalization itself.

Shee, K.C., in reply.

LORD ALVERSTONE C.J. We have none of us any doubt whatever upon this point; but, having regard to the nature of the proceedings and their serious character, we thought it better that the matter should be fully argued before we expressed our opinion. The indictment charges the prisoner in two counts with adhering to the Government of the South African Republic, and in the others with adhering to the Government of the Orange Free State, and it alleges altogether some fifteen overt acts; but for the purposes of the argument that has been addressed to us it is important to draw a distinction between the two first overt acts and the subsequent overt acts. The two first acts, the declaration of willingness to take up arms and the taking of oath of allegiance to the South African Republic, although they took place on the same day as the grant of letters of naturalization, in fact preceded it. The other overt acts were all deliberate acts of warfare or in aid of warfare against the forces of the Crown, and took place subsequently to the grant of naturalization. It is not disputed on behalf of the prisoner that, apart from the Naturalization Act, 1870, the alleged naturalization in the enemy State would afford no defence. But reliance is placed on s. 6, which provides that "any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien." It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect to the two first overt acts, for by s. 15, "Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien." And it cannot be seriously contended that the two first acts which formed the basis of the naturalization, and without which naturalization could not under the circumstances have been obtained at all, were not "done before the date of his so becoming an alien" within the meaning of s. 15. But, further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person whatever. If it was the intention of the Legislature to produce so strange a result, that intention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance.

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(1) (1822) 7 Wheaton, 283, at p. 347.

Wills J. I am of the same opinion. I think it is impossible to contend that the two acts which preceded the letters of naturalization were not such acts as are fit to be submitted to the jury as evidence of treason committed; there is certainly nothing in the Act of Parliament which could make the letters of naturalization, supposing they were valid, cover those two acts. With regard to the rest of the case, it is sufficient for me to say that throughout the argument I have never been able to comprehend how an act of treason could give any sort of rights, or could exempt a person from criminal responsibility for subsequent acts of treason. If Mr. Shee's argument were sound, an army might, if each member of it were individually to accept letters of naturalization from the enemy, desert in the hour of battle without rendering any of its members liable to the penalties of treason. So extravagant a conclusion shews conclusively that the contention cannot be supported.

Channell J. I am of the same opinion. The only question before us is the construction of s. 6 of the Naturalization Act, 1870, and it seems to me that there is not a word in the section that can possibly bear the construction that is sought to be put upon it. The section is not dealing with the circumstances under which naturalization may be legal or may be illegal, but with the consequences of the naturalization. It assumes throughout that naturalization did exist, and was not in itself unlawful, and then it says that where naturalization in a foreign State has taken place or may take place it shall have certain consequences. It does not make naturalization under the particular circumstances more legal or more illegal than it was before. And it is not disputed that before the Act

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Rex v. Lynch.

Channell J.

naturalization in a foreign State with which we were at peace was legal, but in an enemy State was obviously illegal and an act of treason. The result is that, so far as the first two overt acts are concerned, they would have been acts of treason if committed before 1870, and there is nothing in the Act to make them otherwise now. That being so, it is unnecessary to have recourse to s. 15. Indeed, I think there is much to be said in favour of the contention that the declaration and oath which were expressly made for the purpose of obtaining naturalization, and were followed by letters of naturalization granted on the same day, might fairly be treated as one transaction. Therefore, in my opinion, s. 15 does not help the case much. But, as I have said, it is not necessary to have recourse to it. The subsequent overt acts no doubt stand on a different footing, and I am quite prepared to adopt everything that has been said by my Lord on that branch of the case.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitors for prisoner: *Charles Russell & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 4.

RANDT GOLD MINING COMPANY *v.* NEW BALKIS EERSTELING, LIMITED.

Company—Call unpaid—Forfeited Shares—Sale of—Power to make Fresh Call on Purchaser—Companies Act, 1862, *Sched. I., Table A, art.* 22.

A. was the holder of certain partially paid shares in the plaintiff company. The plaintiffs having called up the balance remaining unpaid on the shares, A. neglected to pay the call. The plaintiffs then declared A.'s shares to be forfeited, and sold the shares so forfeited to the defendants; and issued to the defendants a certificate in which they stated that the unpaid call was payable by A., and that the defendants were to be deemed to be the holders of the said shares "discharged from all calls due prior to the date hereof." Subsequently the plaintiffs made a fresh call upon the defendants on account of the balance of the shares which still remained unpaid. The defendants refused to pay, upon the ground that the plaintiffs having once called up the unpaid balance of the shares had exhausted their power of making calls, and that by the terms of the certificate, which followed the language of Table A, art. 22, in Sched. I. of the Companies Act, 1862, and was consequently intra vires, the remedy of the plaintiffs for the unpaid portion of the shares was against A. alone:—

Held, that the defendants were liable to pay the fresh call; that the object of art. 22 was only to enable the company to give a good title to the purchaser of the forfeited shares, and that it relieved him only from liability in respect of calls due prior to the purchase, and did not discharge him from the obligation to pay fresh calls for the amount unpaid on the shares.

Appeal from Bucknill J.

The plaintiff company was incorporated in 1895 under the Companies Acts, 1862 to 1890, and was limited by shares. The shares were of the nominal value of 5*s.* In April, 1900, the African Gold Properties, Limited, were the holders of 40,000 of the said shares in the plaintiff company, upon which shares 3*s.* 4*d.* per share had been paid. The remaining 1*s.* 8*d.* per share had been called up; but the African Gold Properties, Limited, had neglected to pay the call, and, by a resolution of the plaintiff company dated April 18, 1900, the said 40,000 shares were declared to be forfeited, and they thereupon became the property of the plaintiff company. The plaintiffs then sold the shares so forfeited to the defendants, and issued to them a certificate in the following form:—

"The Randt Gold Mining Company, Limited.

"Certificate.

"This is to certify that the New Balkis Eersteling, Limited, of &c., is the holder of 40,000 shares of five shillings each . . . . in the above-named company, upon which the sum of three shillings fourpence per share has been paid. The remaining one shilling eightpence per share has been called up and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited, and the said the New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." (1)

Upon December 12, 1900, the plaintiffs made a call of 1*s.* 3*d.* per share, and upon the defendants' refusal to pay brought this action for the amount of the call. The defendants pleaded that the plaintiffs having already called up the full amount of the shares from the previous holders had exhausted their power of making further calls, and also that by the issue of the above-mentioned certificate the plaintiffs were estopped from disputing that their right of recovery of the unpaid portion of the shares was against the previous holders alone. The action was tried before Bucknill J. without a jury. The judge gave judgment for the plaintiffs. The defendants appealed.

A. T. Lawrence, K.C., and *C. C. Scott*, for the defendants.

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(1) By Table A, art. 22, in Sched. I. of the Companies Act, 1862, "A statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale."

If a call has once been made up to the full amount of a share the company's power of making calls is gone; and if, upon the holder failing to pay the call, the share is forfeited and sold to a purchaser, there is no power to make a call upon the purchaser for the unpaid portion of the share; and, further, if at the time of the sale of the forfeited share a certificate is granted to the purchaser in the terms of art. 22 of Table A, he gets the share as fully paid up. The judge below felt bound by the cases of *Ooregum Gold Mining Company of India* v. *Roper* (1) and *Welton* v. *Saffery* (2), in which it was held that it is ultra vires for a company limited by shares to issue its shares at a discount. But those decisions only apply to the original issue of shares. Here the shares were properly issued at the full amount, and there was always somebody liable for that amount. The position of the shares immediately before the call of 1*s*. 8*d*. was made upon the African Gold Properties, Limited, was this—there was 3*s*. 4*d*. paid up and a liability in respect of the residue. Then when the call was made that liability was, under the provisions of s. 16 of the Companies Act, 1862, transformed into a specialty debt. The liability was merged, and the company's power of making calls was exhausted. If the forfeited shares had been sold to the defendants without the certificate which was here given, the effect would have been to make the defendants liable, not to another call, but to pay the debt which was due on the unpaid call which was already made. The bargain contained in the certificate was that the shares were sold discharged from the liability of that debt. The effect of selling the shares so discharged from that debt is not to diminish the capital of the company, but to leave it in exactly the same position. The capital is not altered by some of the shareholders proving to be insolvent and unable to pay their calls, and if their shares, being fully called up, are forfeited and sold to purchasers as fully paid, the company has just the same remedy for the unpaid portion as they had before the forfeiture, namely, against the defaulting shareholders for what that remedy is worth. If the purchaser of the forfeited shares were liable to fresh calls the effect might be to increase the capital of the company, for the defaulting shareholder would still remain liable for the debt, and the company would be entitled to get the money twice over. In *In re Exchange Banking Co., Ramwell's Case* (1), it was held by Bacon V.-C. that original shares that have been declared to be forfeited for non-payment of calls may be resold by the directors for less than the nominal value without a contract registered in accordance with s. 25 of the Companies Act, 1867. He was of opinion that the company may deal with shares that they acquire by forfeiture in the same way that they deal with any chattel in their possession. In *Morrison* v. *Trustees, &c., Insurance Corporation* (2) Chitty L.J. drew the same distinction between an original issue of shares and a sale of shares that have been forfeited, and held that the principle which forbids the issue of shares at a discount did not apply to the latter.

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(1) [1892] A. C. 125.

(2) [1897] A. C. 299.

Sir Robert Reid, K.C., and *Clauson*, for the plaintiffs. *Ramwell's Case* (1) is not in point. There the question was as to the obligation to register the agreement under s. 25 of the Act of 1867. A share in a company is of such a nature that it cannot be held except subject to an obligation to pay the whole amount: *Welton* v. *Saffery*. (3) The object of art. 22 of Table A is to give the purchaser of the forfeited share a good title, to free him from possible claims by the former shareholder, and from all liability in respect of calls due prior to the purchase. If it were not for the provisions of that article the purchaser might be liable to a second forfeiture without any fresh call being made, merely by reason of non-payment of the previous call. He would also be liable for interest upon the amount of the call from the date when it was made. Called-up money and paid-up money are not the same thing. There is no authority for the proposition that more than one call cannot be made for the same sum, even though at the time of the different calls the share is in the hands of the same shareholder. If the contention of the appellants is right, then the rule of *Welton* v. *Saffery* (3), that shares cannot be issued at a discount, may be got rid of by the simple expedient of issuing the shares to a man of straw, calling up the full amount, forfeiting them for non-payment, and then selling them for any price the directors may think proper.

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(1) (1881) 50 L. J. (Ch.) 827.
(2) (1899) 79 L. T. 605.
(3) [1897] A. C. 299.

Lawrence, K.C., in reply.

EARL OF HALSBURY L.C. In this case I entertain no doubt that the judgment of Bucknill J. was right. In order rightly to appreciate the question which is here raised one must consider the general purview of the limited liability system which was introduced by the Companies Act, 1862, and examine the particular portion of that statute which is here relied upon by the appellants in the light of what that scheme was intended to establish. It was to be a scheme of limited liability, a sort of partnership in which the liability of each member of the partnership was to be limited to an amount ascertained by what has been called the "face value" of the share. I think that the confusion which has arisen in some of the cases is due to not sufficiently observing what is meant by what we call "the share" and the "sale of the share," and by not recognising that the share makes the holder of it a member of a trading partnership, and, as such, subject to all those liabilities of the partnership which the Legislature has imposed upon it by what I may call the statutory deed of partnership. That statutory deed has this operation, that you cannot go outside it. The amount subscribed, which is to make the shareholder a partner in the concern, must be paid, and by no expedient nor indirect arrangement can the company evade the obligation of possessing the capital which the Legislature has enjoined shall be the capital upon which it is to trade. It has provided means by which the capital shall be subscribed, and the partners compelled to pay what they by taking the shares have agreed to pay. It has also provided that the governing body shall be at liberty either to call up the whole of the agreed sum, or portions of the agreed sum, at such times and in such ways as they think proper by their rules to determine. It gives specimen rules, but does not bind the company to adopt those rules. Among the things which the company can do is this—they can say: "If you do not pay at such and such a time the money which you have agreed by taking the shares to subscribe, your rights in the company shall go, you shall cease to be a member of it, and your shares shall be forfeited, but you shall nevertheless remain liable to pay what you have been called on to pay, and shall be charged with interest upon that sum while it is unpaid." The Legislature further provides that the shares in the partnership which belonged to the defaulting shareholder shall be capable of being sold to another person; but, though that other person is to be relieved from any liability for calls made previously to his becoming a holder of the shares, there is nothing whatever which suggests that he should be relieved from paying the balance still remaining unpaid on the shares. That the new holder of the shares which have been forfeited should be relieved from liability for calls made before he became a member of the company seems intelligible enough, but that he should be relieved from responsibility for future calls seems to me to be against the scheme and intention of the statutes. If that view is correct this case is, as it seems to me, answered by the observations I have made, when art. 22 of Table A is read by the light of those observations. If what is still due on the share is called up in due course, it does not matter whether there has been a previous call or not, unless it has been paid. If it has been paid in full the liability on the share is gone. But if all that has happened is that a call has been made which has not been paid, how can it be said that the capital of the company has been preserved in the manner in which, as I have said, the Legislature has determined that the capital shall be preserved, or that it has been paid up by the persons responsible to pay?

Let us see what art. 22, upon which so much reliance has been placed, involves, and what it is intended to do. But for that article see what might happen. The purchaser of the forfeited share, who knows nothing about the previous call, might be vexed by a claim to the share by the former holder, who might say that the call was for some reason or other irregular, that the forfeiture was consequently invalid, and that the purchaser had no title to the share. Then art. 22 prescribes the steps to be taken by which the title to the share shall be absolutely assured to the new shareholder, and adds that "thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale." To my mind it is absolutely impossible to consider that that has relation to anything except what it purports to have relation to, namely, the title of the new shareholder to the forfeited share.

I do not wish to say anything beyond the immediate necessities of the case. For myself I doubt whether any contract made by the directors of a company in the name of the company, which would affect their obligation to preserve their statutable rights, could have any operation. But I do not deal with that question here, because in this case there was no such contract made. All that was done was that a certificate was given following the language of art. 22; and for the reasons which I have given that certificate was not intended to protect the purchaser from paying that which, by becoming a shareholder, he became liable to pay, namely, the amount remaining unpaid on the shares. For these reasons I am of opinion that the appeal should be dismissed.

LORD ALVERSTONE C.J. I entirely agree with the judgment of the Lord Chancellor for the reasons which he has given.

SIR F. H. JEUNE P. I am of the same opinion.

Appeal dismissed.

Solicitors for defendants: *Dale, Newman & Hood.*
Solicitors for plaintiffs: *Sanderson, Adkin & Lee.*

J. F. C.

No longer good law. R. *v.* PORTER. [1949] 1 All E.R. 646.

1903
Feb. 7.

[CROWN CASES RESERVED.]

THE KING *v.* ALBERT DEAVILLE.
THE KING *v.* JOHN DEAVILLE.
THE KING *v.* SIMPSON.

Gaming—Place used for Betting—Bar of Public-house—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

Where a bookmaker is in the habit of frequenting the bar of a public-house for the purpose of carrying on a business of ready-money betting with persons resorting thereto, but for the purposes of that business does not occupy any specific portion of the bar, the question whether he "uses" the bar for the purpose of betting in contravention of s. 3 of the Betting Act, 1853, depends upon whether he so carries on his betting business there with the knowledge and permission of the occupier of the house.

Belton v. *Busby*, [1899] 2 Q.B. 380, and *Tromans* v. *Hodkinson*, [1903] 1 K. B. 30, followed.

CASES stated by the recorder of Hanley for the consideration of the Court for Crown Cases Reserved.

THE KING *v.* ALBERT DEAVILLE.

1. The indictment charged that the defendant on May 24, 1902, being a person then using a certain licensed public-house known by the name of the Park Inn at Hanley, unlawfully did use the said house for the purpose of betting with persons resorting thereto, contrary to the provisions of s. 3 of the Betting Act, 1853. Seven other counts charged a similar offence on seven subsequent days.

2. It was proved that the defendant was a bookmaker, and that on each of the days mentioned in the indictment he was in fact for a considerable time in the "vaults" or an adjacent public room of the Park Inn. He there received on each occasion money from persons by way of bets on horses, and on several of these occasions he paid money to persons in respect of winnings on bets made, some or all in the same place. No evidence was given that the occupier or his servants saw or knew what was going on.

3. At the close of the case for the prosecution, counsel for the defendant submitted that there was no case for the jury. He contended that the user prohibited by the Betting Act, 1853, was the user by a person having something in the nature of dominion or control over the place, having some right of user peculiar to himself as against others, or at least having the permission or licence of the occupier, and he cited *Whitehurst* v. *Fincher* (1), *Powell* v. *Kempton Park Racecourse Co.* (2), and *Belton* v. *Busby*. (3) In reply, *Belton* v. *Busby* (3) was relied on as distinguishing *Powell* v. *Kempton Park Racecourse Co.* (2) from the present case.

4. The recorder refused to withdraw the case from the jury. He directed them, in accordance with the case of *Reg.* v. *Worton* (4), to consider whether the defendant did in fact use the respective rooms on the days mentioned, and if so whether he used them for the purpose of betting with persons resorting thereto. He directed them that a mere casual user of the rooms would not be sufficient, but that if the defendant attended there with the expectation that persons would come to bet with him, and for the purpose of inviting them so to do, and so of carrying on his business as a bookmaker, that would be a breach of the statute, and he told them that no evidence of permission by the occupier was necessary, nor was it necessary that the defendant should have any control, dominion, or right peculiar to himself as against others over the place. The jury found the prisoner guilty on all counts.

Danckwerts, K.C., and *Keogh*, for the appellant. The bookmaker here was not a person "using" the vaults for betting purposes within the meaning of the section. To come within the section he must use it as *his* office, room, or place—that is to say, he must have some exclusive right in it as against other persons. In *Powell* v. *Kempton Park Racecourse Co.* (5), in the Court of Appeal, Lord Esher says: "Now there are and must be some essential rights of a person using a place as his

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(1) (1890) 17 Cox, 70.
(2) [1899] A. C. 143.
(3) [1899] 2 Q. B. 380.
(4) [1895] 1 Q. B. 227.
(5) [1897] 2 Q. B. 242, at p. 257.

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house, his office, or his room different from the rights as to it of persons who are not using it as their house, office, or room. He must have some rights of user peculiar to himself, and exclusive of their rights, if any" . . . . "A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit." A. L. Smith L.J. says (1): "The user of a place in common with mankind in general is not such an user as is contemplated by the Act." The language there used applies as well to bookmakers betting in the public room of an inn as upon a racecourse. Lord Halsbury in the same case in the House of Lords says (2): "I think it is clear that what the statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment." . . . . "It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto." The decision in *Belton* v. *Busby* (3), where a bookmaker, who was in the habit of attending at the bar of a beerhouse for the purpose of betting, was held to have "used" it within the meaning of the section, is not inconsistent with the present contention, for there the bookmaker not merely frequented the bar for betting purposes, but did so with the knowledge and permission of the occupier, so that, as Grantham J. said, he had "something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there." And the conviction in the recent case of *Tromans* v. *Hodkinson* (4) was affirmed upon the same ground. In each of those cases the frequency of the use of the bar by the bookmaker for betting purposes, coupled with the landlord's permission so to use it, was sufficient to shew that the bookmaker used it as *his* betting office.

(1) [1897] 2 Q. B. 242, at p. 276.

(2) [1899] A. C. 143, at p. 159.

(3) [1899] 2 Q. B. 380.

(4) Ante, p. 30.

B. C. Brough, for the prosecution. It was not essential to the decisions in *Belton* v. *Busby* (1) and *Tromans* v. *Hodkinson* (2) that the landlords should have assented to the betting being carried on in their houses. What is aimed at by the Act is the localization of betting. "It is not betting, whatever may be its kind, which, independent of locality, is struck at, but it is the providing of a locality for particular kinds of betting which is the mischief to be dealt with": per Lord Esher M.R. in *Powell* v. *Kempton Park Racecourse Co.* (3) In the same case Lord James says (4): "Directly a definite localization of the business of betting is effected, be it under a tent or even movable umbrella, it may well be held that a 'place' exists for the purposes of a conviction under the Act." And this principle was since that decision applied by Darling and Channell JJ. in *Brown* v. *Patch* (5) to the case of a bookmaker standing upon a box on a racecourse and inviting persons to bet. It was there held that he ought to be convicted, although there was no evidence that the owners of the racecourse gave him any special permission to use the box for that purpose. When once you get a sufficient localization of the betting business the permission of the owner of the premises is superfluous. And you do get a sufficient localization wherever the business is carried on in a house, office, or room, even though the bookmaker may have no special right or interest in the house, office, or room in question. This was the view of A. L. Smith L.J. in the *Kempton Park Case* (6), for he said: "I do not propose to deal with the numerous cases which have arisen about the user of rooms at public-houses by betting men when carrying on their business of betting with persons resorting thereto, for the words 'house' and 'room' are specifically mentioned in the Act as two of the prohibited places, when used by a betting man for the carrying on the business of betting therein, and in my judgment those cases have no application to betting in an inclosure at a racecourse in the usual way as in the present case." And that Lord

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(1) [1899] 2 Q. B. 380.

(2) Ante, p. 30.

(3) [1897] 2 Q. B. 242, at p. 256.

(4) [1899] A. C. 143, at p. 194.

(5) [1899] 1 Q. B. 892.

(6) [1897] 2 Q. B. 242, at p. 279.

Halsbury did not intend to negative this proposition seems clear from the fact that (1) he expressed approval of the "luminous judgment" of A. L. Smith L.J. And Lord James (2) took the same view, for he pointed out that at the time of the passing of the Act, in addition to other classes of houses opened for the sole purpose of carrying on the business of betting, "public-houses also were utilised for effecting the same object"; and suggested that the use of a public-house for that purpose was without more within the Act, although it was necessarily open to all members of the public in common.

THE KING *v.* JOHN DEAVILLE.

1. The indictment charged that the defendant on May 24, 1902, being the occupier of the Park Inn, unlawfully and knowingly permitted the house to be used for the purpose of Albert Deaville, a person then using the house, betting with persons resorting thereto. Six other counts charged a similar offence on six subsequent days.

2. It was proved that on each of the days mentioned Albert Deaville used the house, of which his father, the defendant, was occupier, in the manner above stated in *Rex* v. *Albert Deaville*, and that on each of those days the defendant was present and could see what was going on.

3. Counsel for the defendant submitted that there was no case to go to the jury. The recorder refused to withdraw the case from the jury, who found the defendant guilty on all the counts.

Keogh, for the appellant. The decision of the House of Lords in the *Kempton Park Case* (3) shews that no offence was committed here. There was no "use" of the house by Albert Deaville for the purposes of betting within the meaning of the section. The knowledge and permission of the appellant is immaterial for this purpose. The defendants in the *Kempton Park Case* (3) equally knew of and permitted the practice of bookmakers betting in the inclosure. And no distinction can be drawn in this respect between a racecourse inclosure and the bar of an inn; the public are equally admitted to both.

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(1) [1899] A. C. 143, at p. 163.

(2) [1899] A. C. at p. 191.

(3) [1899] A. C. 143.

Brough, for the prosecution.

THE KING *v.* SIMPSON.

1. The indictment charged that the defendant, on May 9, 1902, being a person then using a licensed public-house known as the Traveller's Rest, did use it for the purpose of betting with persons resorting thereto. Other counts charged a similar offence on eight subsequent days.

2. The evidence as to the acts and conduct of the defendant was similar in all material points to the evidence against Albert Deaville, except that no relationship existed between the defendant and the occupier.

3. The recorder left the case to the jury, who found the prisoner guilty on all the counts, but added that the user was without the full knowledge and consent of the occupier, and that they thought he, the occupier, did not know exactly what was being done.

Keogh, for the appellant.

Brough, for the prosecution.

LORD ALVERSTONE C.J. In the cases of Albert Deaville and Simpson I regret to be obliged to come to the conclusion that the convictions cannot be supported. But I am glad to think that no harm will result, because the only reason for my coming to that conclusion is that upon the statement of the case no sufficient evidence was given of a state of facts which, in any case where an offence has really been committed, can undoubtedly be proved to exist.

In *Rex* v. *Albert Deaville* no evidence was given that the occupier or his servants saw or knew what was going on. Why that evidence was not given I cannot say; but it seems to me that if there is evidence of a practice of carrying on a betting business for a considerable number of days in a public-house, and that it is brought to the knowledge of the proprietor, it is quite right to direct the jury that they may infer that what the bookmaker was doing was being done with the licence and authority of the publican. Mr. Danckwerts has satisfied me that the view that I was at first disposed to take of the *Kempton Park Case* (1) was too narrow. I thought at first that if it was established that a person was carrying on a betting business in a place, that would be sufficient evidence of an offence under the statute, and that it was not necessary to shew that the owner of the place had given any licence or authority to carry it on. I think that view went too far; if it were to prevail, it would be an offence for persons secretly to bet together in a public-house.

For the purpose of construing the statute it is now unnecessary to consider any cases decided before the *Kempton Park Case.* (1) But there are three cases decided since that case directly bearing upon the question before us. I agree with Mr. Brough that, if you get sufficient localization of the betting business, as is the case where the betting man is in possession of the particular plot of ground or structure on which he carries on his business, the question of the permission or licence of the owner of that plot or structure to use it for betting purposes is immaterial. That is what was pointed out in *Brown* v. *Patch.* (2) But in the absence of a localization of that kind the permission of the owner is most material. In *Belton* v. *Busby* (3) the facts were that a bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, and he carried on there a business of ready-money betting with the knowledge and permission of the licensed occupier of the beerhouse. The beerhouse-keeper had no interest in the bets, and the bookmaker had no interest in or control over the house. It was there inferred by the Court from the facts stated that the bookmaker "had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there," and upon that ground they held that he had committed an offence against the Act. That decision was followed in *Tromans* v. *Hodkinson* (1), where the facts were similar, and the justices found that the betting business was carried on under some arrangement or undertaking come to with the landlord of the inn. It seems to me, therefore, that, assuming you find a betting business carried on in a place which is not either in law or in fact in possession of the person charged, but is a common place to which persons have access for other purposes, you require to give evidence from which the jury may infer that the person who owns the place authorized or permitted the prohibited business to be carried on. The second case stands on a different footing, the evidence which was wanting in Albert Deaville's case being here supplied. It was expressly found that the defendant, the occupier of the house, was present on each of the days mentioned in the several counts, and could see what was going on, which I understand to mean that the publican authorized his son to use the house for the purpose of his betting business. In that case, therefore, the conviction was right. In the third case the facts are practically the same as in the first: the jury found that the publican did not know what was being done, and did not assent to it. I am of opinion, therefore, that the convictions in the first and third cases must be quashed, and that in the second case confirmed.

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(1) [1899] A. C. 143.

(2) [1899] 1 Q. B. 892.

(3) [1899] 2 Q. B. 380.

WILLS J. I am of the same opinion, and upon the same grounds. I think that *Belton* v. *Busby* (2) and *Tromans* v. *Hodkinson* (1) were rightly decided. It follows from that that in the first and third cases the convictions cannot be supported, and in the second it can.

WRIGHT J. I agree.

BRUCE J. I entertain some doubt whether the convictions in the cases of Albert Deaville and Simpson ought not to be affirmed. The words of the section applicable to the present cases are: "No room . . . . shall . . . . be used for the purpose of . . . . any person using the same . . . . betting with persons resorting thereto"; and, apart from the language of the Lord Chancellor in the *Kempton Park Case* (1), I should have thought that the evidence established that the defendants were persons using the room, and that it was used by them for the purpose of betting with persons resorting thereto. I am inclined to think that the Lord Chancellor, when restricting the meaning of the term "use" to "a use by some person having the dominion and control over the place," had in his mind the indefinite term "place," and not the preceding words of the section, "house, office, room," and that he did not mean to say that in the case of a house, office, or room a user in common with other members of the public would not suffice. But, as my learned brethren think that this view is too narrow, I feel that I ought not to persist in my doubt. I therefore, although with hesitation, concur in the judgment.

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(1) Ante, p. 30.

(2) [1899] 2 Q. B. 380.

RIDLEY J. I agree with the judgment of the Lord Chief Justice.

Convictions in Rex v. *Albert Deaville and Rex.* v. *Simpson quashed. Conviction in Rex* v. *John Deaville affirmed.*

Solicitor for the prosecution: *A. Challinor, Hanley.*

Solicitors for A. and J. Deaville: *Chester & Son, for Paddock & Sons, Hanley.*

Solicitors for Simpson: *Chester & Co., for E. A. Paine, Hanley.*

J. F. C.

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(1) [1899] A. C. 143.

CYCLEMAKERS' CO-OPERATIVE SUPPLY COMPANY v. SIMS.

1903
Jan. 16.

Company—Winding-up—Liquidator—Power to compromise Action—Extraordinary Resolution—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 160.

A compromise by the liquidator of a company in voluntary liquidation of a claim by the company against a third party is, if not set aside, binding on the company, although entered into by the liquidator without obtaining the sanction of an extraordinary resolution of the company under s. 160 of the Companies Act, 1862.

APPEAL of the defendant from the decision of the judge of the Clerkenwell County Court.

The action was brought by one Poppleton, the liquidator of the plaintiff company, against the defendant, a director of the company, to recover 50*l*. received by him by way of commission from the company. The facts, which were not in dispute, shewed that prior to February, 1898, the defendant, who was then a director, did certain work for the company, and that in that month he was paid 50*l*. by the company as commission. In September, 1899, the company went into voluntary liquidation, one Turner being appointed liquidator. An action was brought by Turner, as liquidator, against the defendant to recover the 50*l*., which was compromised on April 24, 1900, by the payment of 14*l*. in full settlement of the claim against the defendant, and a receipt to that effect was given by Turner. In April, 1901, the company was ordered to be compulsorily wound up, Poppleton being appointed official liquidator, and in May, 1902, the present action was commenced by Poppleton in the High Court on the ground that the compromise made with Turner was invalid by reason of its not having been sanctioned by an extraordinary resolution of the shareholders under s. 160 of the Companies Act, 1862. The action was remitted to the Clerkenwell County Court, and the learned judge found that the compromise was invalid for the above reason; but he treated the 14*l*. paid under the compromise as though it had been paid into court in the present action, and gave judgment for the plaintiffs for 36*l*. The defendant appealed.

Llewellyn Williams, for the defendant. The county court judge was wrong. An extraordinary resolution of shareholders under s. 160 of the Companies Act, 1862, is not necessary to the validity of a compromise by the liquidator of a claim by the company against a third party. A liquidator has general power to compromise law-suits. Under s. 133, sub-s. 7, of the Companies Act, 1862, a voluntary liquidator has the same power that is given to an official liquidator by the Act; he has, therefore, the right to bring or defend actions given to the official liquidator by s. 95, and a power to compromise an action is part of that right. If the liquidator had not that power, he would not be able to accept money paid into court in satisfaction of the claim, for that would be in effect to compromise the action; nor could he compromise at the last moment when there was no time to procure the passing of an extraordinary resolution, but would be compelled to fight the action to the end. The case of *In re English and Scottish Marine Insurance Co.* (1) shews that a compromise between the liquidator and a third party cannot be objected to by the latter on the ground that the sanction of the Court has not been obtained to it. The true view is that a liquidator has power to compromise, and that the compromise is complete and valid without the sanction of an extraordinary resolution, s. 160 being intended for the protection of the liquidator in case of an objection being made to the compromise. The shareholders could have applied to the Court under s. 138 to set aside the compromise, or have proceeded against the original liquidator for breach of trust under the Companies Act, 1890. Assuming that the liquidator should have obtained the sanction of an extraordinary resolution, the defendant was entitled to rely upon the maxim "Omnia præsumuntur rite esse acta," and to assume that it had been passed, the matter being one relating to what has been styled the indoor management of the company. In any event, the shareholders have by their laches acquiesced in the compromise.

(1) (1870) 23 L. T. (N.S.) 685.

1903

CYCLE-MAKERS' CO-OPERATIVE SUPPLY COMPANY *v.* SIMS.

[CHANNELL J. This action was clearly wrongly brought; a second action could not be brought until the compromise had been set aside.]

That is so; but the point was not taken at the trial.

H. Kisch, for the plaintiffs. Assuming, though it is not clear on the evidence, that an action was in fact brought by Turner against the defendant, the effect of s. 160 is to make an extraordinary resolution a condition precedent to the power of the liquidator to compromise an action; in the absence of such a resolution the compromise is null and void, and it is unnecessary to set it aside; it may be treated as a nullity. The object of the section is the protection of the shareholders against the unauthorized acts of the liquidator. In *In re Dynevor Collieries Co.* (1) it was assumed that an extraordinary resolution was necessary before a compromise could be effected; and *James* v. *May* (2) is an authority for the proposition that a liquidator cannot compromise an action without the consent of the Court.

Llewellyn Williams, in reply, cited *In re Anglo-Romano Water Co., Wright's Case* (3); *In re British Provident Life and Fire Assurance Society*. (4)

LORD ALVERSTONE C.J. The point raised in this case is one of considerable difficulty, but I have formed a clear opinion that the decision of the county court judge was wrong, and that this compromise ought not to be held to be inoperative merely because of the absence of the sanction of an extraordinary resolution. It appears that the plaintiff company had gone into voluntary liquidation, and that Turner, the liquidator, brought an action against the defendant to recover a sum of 50*l.*, which he no doubt owed to the company. The defendant being impecunious, Turner compromised the action for 14*l.*, and that sum was paid; and matters so remained until the present proceedings were taken by the present official liquidator, the plaintiff company having in the meantime been ordered to be wound up compulsorily; the county court judge has given judgment for 36*l.*, the balance of the original claim of 50*l.*, and it is said that he was entitled to take this view because there is no evidence to shew that the original liquidator had obtained the sanction of an extraordinary resolution to the compromise.

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(1) (1879) 11 Ch. D. 605.

(2) (1873) L. R. 6 H. L. 328.

(3) (1870) L. R. 5 Ch. 437.

(4) (1863) 1 D. J. & S. 488.

Two points arise for our consideration: first, what is the real object of the protection afforded by s. 160 of the Companies Act, 1862?—and, secondly, is the obtaining of the sanction of an extraordinary resolution a matter of such a nature that a person dealing with the liquidator is entitled to assume that it has been, or will be, obtained? As to the first point, we have a distinct statement of very great authority which seems to lay down the principle that s. 160 is intended both to protect the interest of the company against the liquidator, and also to protect the liquidator as regards acts done by him in the winding-up. In *In re English and Scottish Marine Insurance Co.* (1) there was a claim by an agent for salary. The winding-up was under the supervision of the Court, and the liquidator was liable to the provisions of s. 160 —that is, he had power to compromise a claim with the sanction of the Court. The liquidator did compromise the claim, and it was contended that the compromise was not binding on the person who made the claim because the liquidator had not obtained the consent of the Court; that consent was, it was contended, a condition precedent to the right to compromise, and it was a condition of the same class as the condition relied on in the present case. In the course of his judgment James L.J. said: "Of course the liquidators, quà liquidators, might probably for their own protection require the sanction of the Court, but they took the positive burden upon themselves; they took the risk upon themselves of making that agreement and the further risk of obtaining that sanction, but as between themselves and the Court. It appears to me, therefore, that that is perfectly conclusive." That case clearly shews that a compromise between a creditor of a company and its liquidator, which is otherwise binding on both, cannot be objected to by the creditor merely on the ground that the liquidator did not obtain the sanction of the

(1) 23 L. T. (N.S.) 685.

Court to the compromise; and if the liquidator can say that the other party to such a compromise is bound by it, it follows that the liquidator himself must also be bound.

Then there is the decision in *In re Anglo-Romano Water Co., Wright's Case* (1), which, though not so directly in point, tends in the same direction. Dealing with the construction of s. 160, Giffard L.J. said: "I think that it is competent to a liquidator, though the liquidation be under supervision, to enter into arrangements of this nature with the sanction of a meeting without the sanction of the Court, unless the Court has directed that he shall not do so without its sanction." That case is obviously not so much in point, as everything that was done by the liquidator was done with the sanction of a general meeting, and the question was whether the additional sanction of the Court was also necessary, but the decision supports the view that the object of s. 160 was to protect the company against the liquidator. The case of *James* v. *May* (2), which has been cited, does not help the plaintiffs; there the directors of a company, which was being voluntarily wound up under the supervision of the Court, purported to make a compromise without obtaining the sanction of the Court, and it was held that the liquidator of the company was not bound by it. Under the circumstances of the present case I do not think that the learned county court judge ought to have held this arrangement, which had been acted upon for two years, to be invalid. There is another objection which, if it had been taken in the Court below, must have been fatal: that, while this compromise was still standing, another action had been brought in respect of the same subject-matter. No doubt a second action might have been brought after the compromise had been set aside; but it is not possible to hold that, while the compromise is still standing, other proceedings can be brought in respect of the same cause of action. I think that this compromise must be held to be binding on the present liquidator.

Further, I think that this compromise ought to be held binding for the additional reason that it was a matter relating

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(1) L. R. 5 Ch. 437.

(2) L. R. 6 H. L. 328.

1903

CYCLE-MAKERS' CO-OPERATIVE SUPPLY COMPANY v. SIMS.

to the internal management of the company, and that a person dealing with the liquidator was not bound to see that every formality was carried out which it was the duty of the liquidator to attend to. For these reasons I am of opinion that the county court judge was wrong and that this appeal must be allowed.

WILLS J. I am of the same opinion. A contrary decision would be attended with extreme inconvenience. Here was a company in process of being wound up, and it is contended that in the endeavour to get at its available assets the liquidator could not compromise a claim made by it without the sanction of an extraordinary resolution; if that were so, the result would be that the compromise of a claim, however desirable in itself, would often be impracticable, for in many cases the expense of calling a general meeting would be great, and might exhaust the assets. It seems to me that the business of winding up a company could not be effectively carried on if the sanction of a general meeting were necessary to the validity of such a compromise. There can be no higher authority on such a question than that of James L.J., whose judgment in *In re English and Scottish Marine Insurance Co.* (1) seems entirely to cover this case.

CHANNELL J. I entirely agree.

Appeal allowed.

Solicitors for plaintiffs: *Kisch, Wake & Wild.*
Solicitor for defendant: *A. W. Osmond.*

W. J. B.

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(1) 23 L. T. (N.S.) 685.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 10.

ATTORNEY-GENERAL *v.* LORD MONTAGU.

Revenue—Estate Duty—Property passing on Death—Principal Value—Mortgage in Fee by Tenant for Life and Remaindermen—Tenant for Life indemnified against Mortgage Debt—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-ss.* 1, 7.

In May, 1888, the Ditton estate stood limited to the Dowager Duchess of Buccleuch for life, and, after her death, to such uses as Lord Montagu and his eldest son should jointly appoint, and, in default of and subject to such appointment, to Lord Montagu for life, with remainders over. By deed of May 29, 1888, the Dowager Duchess, Lord Montagu, and his eldest son concurred in granting and appointing the fee by way of mortgage to secure payment with interest of 27,000*l.*, advanced by the mortgagees to Lord Montagu and his eldest son, who alone covenanted to repay the principal and interest. By a further deed of the same date Lord Montagu and his eldest son covenanted to indemnify the Duchess and the Ditton estate during her lifetime against the mortgage debt and interest, and they conveyed and assigned to trustees a yearly sum of 1500*l.* charged on other estates, in which they had a sufficient interest, upon trust to keep down the interest on the mortgage, and otherwise to effectuate the indemnity of the Duchess in the manner therein mentioned. The Duchess and the Ditton estate during her lifetime were in fact kept fully indemnified against the mortgage debt and interest. The Duchess died on March 28, 1895:—

Held, reversing the judgment of Phillimore J., that, in calculating the value of the estate which passed upon the death of the Duchess for the purpose of estate duty, the mortgage debt of 27,000*l.* must be deducted from the principal value of the Ditton estate.

APPEAL from the judgment of Phillimore J. upon an information by the Attorney-General, claiming on behalf of the Crown estate duty under the Finance Act, 1894.

The facts, and the provisions of the instruments, on which the question turned, will be found very fully stated in the report of the case in the Court below (1), but for the purposes of this report they may be more shortly stated as follows. By his will dated August 8, 1883, Walter Francis, Duke of Buccleuch, limited and appointed his Ditton estate in the counties of Buckingham and Middlesex to the use of his wife, Charlotte Ann, Duchess of Buccleuch, for life, and, from and after her decease, to the use of his second son, Lord Montagu, for life, and, after his decease, to the use of his first and other sons successively, according to priority of birth, in tail male, with divers remainders over. The testator died on April 16, 1884.

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(1) [1902] 1 K. B. 429.

By an indenture dated May 28, 1888, being a disentailing assurance and resettlement, the Ditton estate was disentailed, and, subject to the life estate of the Duchess, resettled to such uses as Lord Montagu and his eldest son, J. W. E. D. Scott Montagu, should from time to time by deed jointly appoint, and, in default of and subject to any such appointment, to the use of Lord Montagu for life in restoration of the life estate given to him by the will, with remainder to such uses as J. W. E. D. Scott Montagu, after the death of Lord Montagu, should from time to time by deed or will appoint, and, in default of and subject to any such appointment, to the use of J. W. E. D. Scott Montagu for his life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over.

By an indenture of mortgage dated May 29, 1888, in consideration of the sum of 27,000*l.* lent to Lord Montagu and J. W. E. D. Scott Montagu at the request of the Dowager Duchess of Buccleuch by three mortgagees, Lord Montagu and J. W. E. D. Scott Montagu jointly and severally covenanted with the mortgagees to pay the mortgage debt with interest as therein provided, and, for the consideration aforesaid, the Dowager Duchess of Buccleuch, as tenant for life in possession under the will of her deceased husband, granted, and Lord Montagu and J. W. E. D. Scott Montagu, in the exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the death of the Dowager Duchess of Buccleuch by the disentailing deed, appointed the Ditton estate to hold unto and to the use of the mortgagees in fee simple, subject to a proviso for redemption and reconveyance on payment of the principal sum and interest.

By an indenture of even date with the last-mentioned indenture, after reciting that the Dowager Duchess of Buccleuch agreed, at the request of Lord Montagu and J. W. E. D. Scott Montagu, to concur in the mortgage of the Ditton estate upon express condition that she should be indemnified in respect thereof in the manner thereinafter appearing, it was witnessed that, in pursuance of the said agreement, Lord Montagu and J. W. E. D. Scott Montagu did jointly, and each of them as a separate covenant did for himself, covenant to keep indemnified the Dowager Duchess of Buccleuch, and the Ditton estate during her life, against the mortgage debt of 27,000*l.* and interest, and a certain annuity or yearly sum of 1500*l.* charged upon estates other than the Ditton estate, in which they had interests, was conveyed and assigned to trustees upon trust thereout to keep down the interest on the mortgage debt, and otherwise effectuate the indemnity of the Dowager Duchess in manner therein provided.

The Dowager Duchess of Buccleuch died on March 28, 1895.

The mortgage of May 29, 1888, was created wholly for the benefit of the defendant Lord Montagu, and his son J. W. E. D. Scott Montagu, or one of them, and the Dowager Duchess of Buccleuch and her estate were in fact kept wholly indemnified by them or one of them, against the mortgage and all claims for interest or otherwise in respect thereof.

The defendant, Lord Montagu, in delivering an account of the estate duty payable on the Ditton estate as passing on the death of the Dowager Duchess, claimed to deduct from the capital value of the estate the mortgage debt of 27,000*l.*, and refused to pay estate duty on the capital value of the estate without such deduction.

The information prayed for a declaration that, upon the death of the Dowager Duchess, estate duty became payable under the Finance Act, 1894, upon the principal value of the Ditton estate as property which passed on her death within the meaning of the Act without deduction of the mortgage debt of 27,000*l.*, and that the defendant was bound to deliver an account and pay duty accordingly.

Phillimore J. gave judgment for the Crown.

C. A.
1903

ATTORNEY-GENERAL
v.
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(LORD).

Danckwerts, K.C., and *Austen-Cartmell*, for the defendant. The judgment of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* (1) shews that this case falls within s. 1 of the Finance Act, 1894, and not within s. 2. The question, therefore, is what property passed within the meaning of s. 1 upon the Duchess's death. All that remained in settlement after the mortgage in this case, and all that could pass on the death of the Duchess, was an equity of redemption. The fact that by a contemporaneous deed an indemnity was given to the Duchess can have no bearing on the question what the property was which passed upon her death. That indemnity cannot enlarge the estate which so passed. This case falls exactly within the principle laid down in the case of *Earl Cowley* v. *Inland Revenue Commissioners*. (1) It can make no substantial difference that in that case the limitations of the original settlement had been destroyed, and the estate mortgaged in the exercise of the power, before the resettlement, whereas here all the persons interested under the settlement combined to mortgage the estate in fee. It cannot make any difference in point of principle whether the mortgage or the settlement comes first. It was laid down in *Earl Cowley* v. *Inland Revenue Commissioners* (1) that duty is payable under the Finance Act, 1894, on two classes of property, namely, property passing upon a death, which comes within s. 1, and property which does not really so pass, but is to be deemed to do so by virtue of s. 2: that such a case as this falls within the first of those classes, and the only property which can be said to pass is an equity of redemption; and, that being so, ss. 2 and 7 have nothing to do with the case. The Duchess and the remaindermen might have combined to sell the estate or a portion of it, and then nothing, or only the residue of the property, would have remained in settlement, and passed on the death of the Duchess; or the Duchess might have accelerated the interest of Lord Montagu, and then the same result would have followed. What took place here has pro tanto the same effect: see per Lord Davey in *Earl Cowley* v. *Inland Revenue Commissioners*. (1)

(1) [1899] A. C. 198.

[They also cited *Attorney-General* v. *Beech* (1); *Attorney-General* v. *De Preville.* (2)]

Sir R. B. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*Vaughan Hawkins* with them), for the Crown. For the purpose of estimating the value of property which has passed on death under the Finance Act, 1894, the substance and reality of the transaction must be looked at. To what amount the value of the property passing is affected by a mortgage depends on circumstances. In this case it is submitted that, by reason of there having been a completely satisfactory indemnity against the mortgage debt given to the Duchess, the value of the property was undiminished, and the value of the equity of redemption which passed was really the value of the whole estate. The Duchess during her life in substance enjoyed the full value of her life estate free of any claim in respect of the mortgage debt or interest thereon. The decision in *Earl Cowley* v. *Inland Revenue Commissioners* (3) does not apply to the present case. There the question was as to what could be considered as passing under the resettlement; and the House of Lords said, with reference to that question, that it was immaterial to consider anything prior to the disentailing deed, and the deed executed by the tenant for life and the remainderman in the exercise of the power, and that, the effect of those instruments being to sweep away all prior limitations, and create a mortgage of the fee, nothing remained to resettle, but an equity of redemption. The considerations which governed that case do not apply to the present. There is no modification or alteration here of the terms of the original settlement. All that has happened is that a mortgage of the property has been effected, which by reason of the indemnity did not in reality affect in the smallest degree the value of the Duchess's life estate. Sect. 7, sub-s. 1, of the Act throws a good deal of light on the question raised in this case, whether it directly applies to the case or not, which may perhaps be somewhat doubtful. It may no doubt be contended that it only applies to the case of an owner in fee, who mortgages or charges. It is submitted that it does apply, but, if it does not, even so it furnishes a strong analogy in reference to this case. By virtue of that sub-section, if an owner in fee mortgaged his property under such conditions as existed in the case of the Duchess of Buccleuch, no deduction could be allowed in respect of the mortgage debt, although there an equity of redemption only would pass on his death. It is contended that s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7, apply to the case. If s. 7, sub-s. 1 or 7, applies, then there is an end of the case; but, even if those provisions do not apply, they shew how the value of the property which must be considered as passing upon the death of the tenant for life ought to be estimated. A mortgage is in substance a mere charge on the estate, and, if the value of that charge was made up aliunde, then really the full beneficial interest remained in the Duchess. The question for this purpose is what was the value of the estate as between the tenant for life and the remainderman.

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(1) [1899] A. C. 53.

(2) [1900] 1 Q. B. 223.

(3) [1899] A. C. 198.

[They cited *Inland Revenue Commissioners* v. *Priestley*. (1)]

Danckwerts, K.C., for the defendant, in reply.

VAUGHAN WILLIAMS L.J. I think that our judgment in this case must be for the defendant. I do not propose to state the facts at length, but only to refer to them so far as is necessary in order to explain the grounds upon which my judgment is based. By the will of the late Duke of Buccleuch his Ditton estate was subject to the following limitations, namely, to the Dowager Duchess of Buccleuch for her life, and, after her decease, to the testator's second son, Lord Montagu, for life, with remainder to his first and other sons successively in tail. In 1888 a disentailing assurance was executed by Lord Montagu and his eldest son, with the consent of the Dowager Duchess, by which a joint power of appointment was given to them. Lord Montagu and his eldest son, being desirous of raising a sum of money by way of loan, induced the Duchess to join them in a mortgage of the estate. It must be admitted that the legal effect of that instrument was to convey the legal estate in the property in fee to the mortgagees as the security for the advance made by them. The result in law was that there was nothing left in the Duchess and the other persons entitled under the settlement except the equity of redemption. Under these circumstances it cannot, I think, be disputed that the only property which passed under the Finance Act, 1894, upon the death of the Duchess was simply an equity of redemption. The question is as to what duty is payable on that property. It appears to me that the case falls within s. 1 of the Finance Act, 1894, and the only question is as to the amount of duty chargeable under that section. It is argued for the Crown that the duty is to be charged as if the life estate of the Duchess had remained as it existed under the original settlement made by the Duke's will, because by an instrument of even date with the mortgage Lord Montagu and his son gave an indemnity against the mortgage debt and interest to the Duchess. It is said that under these circumstances we ought for the purposes of the Finance Act, 1894, to come in some way or other, not very well defined, to the conclusion that the Crown is entitled to the same duty as if the mortgage transaction and the conveyance of the property to the mortgagees in fee had never taken place. I cannot agree with the contention that the giving of the indemnity to the Duchess had such an effect. It is said that we ought to look at the reality and substance of the transaction. I agree; but that does not entitle us to look at the transaction as if it were something which it is not, or to deal with it as if there were in the Act some extension of the provisions of s. 2, which enabled us to deem that in this case property passed upon the death of the Duchess which did not pass. There is, in my opinion, nothing in the Act which enables us to do anything of the kind; and we are not entitled to treat matters as coming within the spirit and intention of the Act when they do not come within any of its words. We have to look simply to the words of the Act, and ask ourselves whether in this case there was, as the result of the mortgage transaction and the indemnity given to the Duchess, anything which could be said to pass on the death of the Duchess besides an equity of redemption. As to this, I agree with the defendant's counsel that, in what was said by Lord Davey in the case of

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(1) [1901] A. C. 208.

Earl Cowley v. *Inland Revenue Commissioners* (1), he appears to deal as it were prophetically with the very case now before us. He there said: "Since the decision in *Attorney-General* v. *Beech* (2) it cannot be denied that, if tenant for life and remainderman in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass, and is not to be deemed to pass, on the death of the life tenant; and I think the result must be the same, if, instead of selling, they combine to create a mortgage in fee upon the settled property. Pro tanto the property is taken out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone." It seems to me that those words exactly cover this case. Arguments have been addressed to us on behalf of the Crown based upon sub-ss. 1 and 7 of s. 7 of the Finance Act, 1894. I am not quite sure that I altogether followed the drift of those arguments: whether the suggestion was that, by reason of what was found in those sub-sections, we ought to give a wider meaning to the words of s. 1 of the Act than they otherwise would bear, or that we ought by reason of them to amplify the effect of s. 2; but, speaking for myself, I propose to say what Lord Davey, and I think in substance Lord Macnaghten also, said in *Earl Cowley* v. *Inland Revenue Commissioners* (3), namely, that there is no occasion for us to trouble ourselves with relation to the provisions of s. 7, if the conclusion is once arrived at that all that could be deemed to pass on the death of the Duchess of Buccleuch was an equity of redemption. For these reasons I think the appeal must be allowed.

STIRLING L.J. I am of the same opinion. I arrive at the conclusion that this appeal must be allowed on the same grounds substantially as those stated by my brother Vaughan Williams; but, as we are differing from the judgment of Phillimore J., I will, out of respect for him, state in my own language the reasons why I cannot agree with his judgment. We are dealing with an information by the Crown in which a declaration is asked for that, upon the death of the Dowager Duchess of Buccleuch, estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the Ditton estate, as property which passed on her death within the meaning of that Act, without deduction of the mortgage debt of 27,000*l*. created by the indenture of mortgage of May 29, 1888, and the learned judge in the Court below made a declaration in accordance with the prayer of the information. We are not concerned to inquire whether there may or may not be a right to estate duty on some other aspect of the transaction than that which is put before us by the information. All we have to consider is whether duty became payable on this estate as property which passed on the death of the Duchess within the meaning of the Act without deduction of the mortgage debt. The Finance Act, 1894, provides by s. 1 that: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'Estate Duty,' at the graduated rates hereinafter mentioned." The first question is what is the meaning of "all property . . . . which passes on the death of such person." That question was considered by the House of Lords in the case of *Earl Cowley* v. *Inland Revenue Commissioners*. (1) Lord Macnaghten there deals with the question in the following manner: "What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which, if it be a limited interest, can never pass. With an interest that ceases on death the Act is not directly concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires. In every case in which property comprised in a settlement passes on death the life estate or other limited interest of the preceding owner must have ceased for good and all." Therefore we have for the

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(1) [1899] A. C. 198, at p. 219.

(2) [1899] A. C. 53.

(3) [1899] A. C. 198.

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(1) [1899] A. C. 198.

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purposes of the Act to consider the question what property passed upon the death, not what interest the deceased person possessed. The question here is whether or no the Ditton estate passed subject to a mortgage.

Prior to the date of the mortgage, which was May 29, 1888, the estate stood limited to the use of the Dowager Duchess of Buccleuch for life, and, after her death, to the use of the testator's second son, Lord Montagu, for life, with remainder to his eldest son, in tail; but by a disentailing deed, subsequently executed, a joint power of appointment was given to Lord Montagu and his eldest son, so that now, practically, for the present purpose, the effect is the same as if the Duchess and Lord Montagu had life interests followed by a remainder to the eldest son of the latter in fee. Lord Montagu and his son were desirous of raising a sum of 27,000*l.*, and applied to the Duchess to aid them in so doing. One way in which their desire might have been carried out was by their all joining in the sale of a portion of the estate of sufficient size to produce the required amount. In that case, when the sale had been effected, and the purchase-money paid over to Lord Montagu and his son, there would have been an end of the settlement altogether as regards that portion of the property: it could not possibly be contended that, after that transaction, the property sold was comprised any longer in the settlement; and the sole property which would have passed on the death of the Duchess, and on which estate duty would have been payable, would have been that portion of the estate which remained unsold. That course was not adopted; but, instead thereof, the Duchess and Lord Montagu and his son executed a mortgage in fee, by which the whole of the estate was conveyed to the mortgagees to secure 27,000*l.* That sum was paid to the father and son, and they covenanted to repay it, the Duchess not making herself personally responsible for its payment, although she joined in the conveyance of the fee to the extent of her life estate. Lord Montagu and his son contemporaneously entered into a covenant by which they undertook to indemnify the Duchess and the estate in her lifetime against the mortgage debt, and they conveyed certain property to trustees on trust to apply the same for the purpose of securing the indemnity of the Duchess in accordance with their covenant. Whatever the arrangements between the parties inter se may have been, they combined to execute a legal mortgage of the property in fee to secure 27,000*l.*; and the question which we have to consider is what the effect of that transaction is as regards the question what property passed upon the death of the Duchess. That question is answered in the clearest way by Lord Davey in the passage which my brother Vaughan Williams has read from *Earl Cowley* v. *Inland Revenue Commissioners* (1), and which it is unnecessary for me to read again. The case is substantially the same as if the tenant for life and the remaindermen had combined to sell a specific portion of the property, and so taken that part out of the settlement: here, to the extent of the mortgage, the whole property is taken out of the settlement. That I take to be the effect of what was laid down in *Earl Cowley* v. *Inland Revenue Commissioners* (1); and, so reading that case, I think we are bound to decide that in this case the property which remained in settlement, and passed on the death of the Duchess, was simply an equity of redemption. It follows that the value of the mortgage debt of 27,000*l.* must be deducted from the principal value of the estate in arriving at the amount of the estate duty. It is not necessary for me to say much as to any of the other points discussed. The 2nd section of the Act does not appear to me to apply for the same reasons as were given in *Earl Cowley* v. *Inland Revenue Commissioners.* (1) With regard to s. 7 also, I can only say, as was said in that case, that, whatever that section may apply to, it has no application to this case, because there is no question here of making any deductions from the value of the equity of redemption, which is the only subject of the duty.

MATHEW L.J. The short question in this case is whether the property which passed on the death of the Duchess is to be treated as subject to the mortgage or not. It was contended, in substance, that it must be treated as not so subject, because

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(1) [1899] A. C. 198.

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of the contract for indemnity entered into with the Duchess. In dealing with that contention we must look to the language of the Finance Act, 1894; and I find nothing in that Act to justify such a contention. It appears to me clear that this case comes within the provisions of s. 1 of the Act, and that the property which passed within the meaning of that section was the equity of redemption in the estate subject to the mortgage, and nothing more. That being so, none of the arguments based upon s. 7 can have any bearing on the case. I agree that this appeal must be allowed.

Appeal allowed.

Solicitor for informant: *Solicitor of Inland Reveuue.*
Solicitor for defendant: *Nicholl, Manisty & Co.*

E. L.

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[IN THE COURT OF APPEAL.]

SCOBLE AND OTHERS *v.* THE SECRETARY OF STATE IN COUNCIL FOR INDIA.

Revenue—Income Tax—Annuity—Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts (5 & 6 *Vict. c.* 35; 16 & 17 *Vict. c.* 34), *Scheds. C and D.*

By a contract, made in 1849 between the East India Company and the Great Indian Peninsula Railway Company, it was agreed that at the expiration of fifty years therefrom it should be lawful for the East India Company, on notice to the railway company, to purchase from them their railway at a price representing the full amount of the value of all the shares or capital stock of the railway company, and that if and when the East India Company should become liable under the contract to pay for the purchase of the railway it should be lawful for them, instead of paying a gross sum therefor, to declare, by notice to the railway company, their option to pay an "annuity," to commence from the time when the gross amount would be payable and to continue during the residue of a term of ninety-nine years, the rate of interest to be used in calculating the annuity to be determined as therein specified. At the expiration of the fifty years the Secretary of State for India, in whom the powers exercisable by the East India Company under the contract had become vested, gave notice to the railway company of his intention to purchase the railway, and the price was determined and became payable. The Secretary of State thereupon duly declared his option to pay an annuity, and the rate of interest to be used in calculating the annuity was duly fixed. The annuity was paid half-yearly, each payment representing, as to a part of it, an instalment of the price paid for the railway, and, as to the residue, interest on the amount of the price for the time being unpaid. This arrangement was sanctioned by a local Act, which provided that the Secretary of State should pay the annuity to certain trustees appointed on behalf of the shareholders of the railway company:—

Held, that so much of each instalment as represented payment of the purchase-money was not within the term "annuity" in Sched. C of the Income Tax Acts, and, therefore, that income tax was not payable upon the whole amount of each half-yearly payment, but only upon so much of it as represented interest.

Judgment of Phillimore J., [1902] 2 K. B. 413, reversed.

APPEAL from the judgment of Phillimore J., reported [1902] 2 K. B. 413.

The action was brought to recover two sums of 8122*l*. 10*s*. 8*d*. and 9611*l*. 6*s*. 6*d*. respectively, alleged to have been wrongfully deducted and retained for income tax by the Secretary of State for India out of an annuity payable by him to the plaintiffs.

The following material facts were admitted at the trial:—

The plaintiffs are the annuity trustees referred to in the Great Indian Peninsula Railway Purchase Act, 1900 (63 & 64 Vict. c. cxxxviii.) (Local).

By a contract dated August 17, 1849, made between the East India Company of the one part, and the Great Indian Peninsula Railway Company of the other part, it was agreed that the East India Company should provide land for a railway to be constructed by the railway company, and that the railway company should construct a railway on that land, and that on the completion thereof the East India Company should grant to the railway company a lease of, or otherwise secure to the railway company a right and title to, that land for a term of ninety-nine years commencing from August 17, 1849, unless the same should be sooner determined under the provisions contained in the contract. Clause 23 of the contract provided: "That at any time . . . . within six calendar months after the expiration of the first fifty years of the said term, it shall be lawful for the East India Company to give notice to the said railway company in London and at Bombay of their intention to purchase the said railway and works, together with the telegraphs (if any) and the engines, carriages, stock, plant, and machinery belonging to the said railway and works, and thereupon at the half-yearly day next but one following such notice the land to be provided as aforesaid, with the railway thereon, and all buildings, works, fixed machinery, telegraphs, and conveniences whatsoever, shall revert to and become the property of the East India Company as the owners thereof by purchase on account of the Government of India . . . . and the East India Company shall be bound to pay in London on the said half-yearly day for the purchase of all the said premises the full amount of the value of all the shares or capital stock in the said railway company."

Clause 26 provided: "That in every or any case in which under the provision of these presents the East India Company shall become bound to repay the capital expended by the said railway company as aforesaid, or in which the East India Company shall become liable to pay for the purchase of the said railway works and stock before the expiration of the said term of ninety-nine years, it shall be lawful for the East India Company, instead of paying a gross sum of money in respect of the premises, to declare by notice to the said railway company in London their option to pay an annuity from the time when the gross amount would be payable, and to continue during the residue of the said term of ninety-nine years, and in that case such annuity shall be payable in London on such two half-yearly days in the year as shall be selected by the East India Company in that behalf, with a fractional part for any broken half-year, the rate of interest which shall be used in calculating such an annuity being determined by the average rate of interest during the preceding two years received in London upon public obligations of the East India Company, and which shall be ascertained by reference to the governor or deputy-governor of the Bank of England for the time being."

The railway was duly constructed, and was subsequently extended under the provisions of two further contracts which incorporated the clauses of the contract of August 17, 1849. Under the statute, 21 & 22 Vict. c. 106, all the powers of the

East India Company under those contracts became and were vested in the Secretary of State in Council for India for the time being.

On August 18, 1899, the Secretary of State, acting in pursuance of the provisions contained in the 23rd clause of the contract of August 17, 1849, gave notice to the railway company of his intention to purchase the railway, works, &c., constructed under the contracts. The amount to be paid by the Secretary of State to the railway company for the purchase was thereupon ascertained in pursuance of the 23rd clause of the contract of August 17, 1849, and was determined to be the sum of 34,859,217*l.* 17*s.* 6*d.*, which sum under the provisions of that contract became payable by the Secretary of State to the railway company in London on June 30, 1900.

The Secretary of State thereupon by notice to the railway company, given pursuant to the provisions contained in the 26th clause of the contract of August 17, 1849, declared his option, instead of paying the sum of 34,859,217*l.* 17*s.* 6*d.*, to pay an annuity commencing on July 1, 1900, and to continue during the residue of the term of ninety-nine years. The rate of interest to be used in the calculation pursuant to clause 26 was ascertained to be 2*l.* 17*s.* per cent., and the amount to be paid under clause 26 was thereupon ascertained, and was fixed at the annual sum of 1,335,563*l.* 18*s.* 4*d.* (which sum was subsequently reduced by certain adjustments, which were not in dispute, to the annual sum of 1,268,508*l.* 11*s.*), payable half-yearly for the residue of the term of ninety-nine years, with a fractional part for the broken half-year at the end. The method of payment provided by the 26th clause was in substance and in fact the payment of the price of 34,859,217*l.* 17*s.* 6*d.* by means of half-yearly instalments, each of such instalments being composed in part of capital and, as to the residue, of interest on the amount of the price for the time being unpaid.

The Great Indian Peninsula Railway Purchase Act, 1900 (63 & 64 Vict. c. cxxxviii.), provided: (s. 11.) that the annuity should be charged on and made payable out of the revenues of India in like manner as other liabilities incurred on account of the Government of India. Sect. 12 provided that the Secretary of State should pay the annuity to the annuity trustees in London at the times and in the manner therein mentioned, the first payment to be made on January 1, 1901, in respect of the six months immediately preceding that payment, and the second on July 1, 1901. The statute further provided that the annuity trustees should divide the holders of annuities into two classes, A and B, Class A consisting of those annuitants who had elected to receive their annuities in full, and Class B consisting of those annuitants who should have elected to receive their annuities, less a sum to be deducted for providing a sinking fund as in the Act prescribed. (No distinction was drawn during the argument between these two classes.)

On January 1, 1901, a payment of 634,254*l.* 5*s.* 6*d.* became due to the annuity trustees in respect of the annuity. Part of that sum—namely, 162,450*l.* 14*s.* 1*d.*—was a payment on account and as part of the capital sum of 34,859,217*l.* 17*s.* 6*d.*, and the residue thereof was a payment in respect of interest on that capital sum for the six months immediately preceding. The Secretary of State for India deducted income tax on the whole of the sum of 634,254*l.* 5*s.* 6*d.* The income tax on 162,450*l.* 14*s.* 1*d.*, which represented a payment of capital, amounted to 8122*l.* 10*s.* 8*d.*

On July 1, 1901, the next half-yearly payment became due, and the Secretary of State for India again deducted income tax upon the whole amount. The income tax on so much of the amount as represented capital was 9611*l.* 6*s.* 6*d.*

The plaintiffs claimed the two sums of 8122*l.* 10*s.* 8*d.* and 9611*l.* 6*s.* 6*d.*, and a declaration "that the half-yearly instalments payable by the Secretary of State are partly a payment by instalments of the price for the purchase of the railways pursuant to the said contracts, and as such are payments on account and as part of capital, and as regards the residue are payments of interest upon the part for the time being unpaid of such price, and that so much of each payment as represents capital is not liable to income tax, and that the plaintiffs are not liable to, and the Secretary of State is not entitled to make, any deduction from future payments in respect of such part of such payments as is a payment on account and as part of the capital sum of 34,859,217*l.* 17*s.* 6*d.*"

The learned judge gave judgment for the defendant. (1)

The plaintiffs appealed.

Cripps, K.C., and *Danckwerts, K.C.* (*T. T. Paine* with them), for the plaintiffs. The foundation of the transaction is a liability on the part of the Secretary of State to pay a capital sum for the purchase of the railway. There is an option given in clause 26, as to the repayment of the capital expended by the company, to substitute for payment down another mode of payment—that is, by instalments consisting in part of capital and in part of interest on unpaid capital.

There is no difficulty in determining the amount of capital paid in each instalment. An analogous case is that of a loan repayable by instalments with interest. In *Leeds Benefit Building Society* v. *Mallandaine* (2), which arose on loans by the society to members, repayable by weekly sums made up of principal and interest, it was not contended that income tax was payable on the amount of the instalments of principal. So under the Union Loans Act, 1869 (32 & 33 Vict. c. 45), s. 5, sums borrowed are to be repaid by annual payments of the principal borrowed with interest on the balance remaining unpaid each year. The form of bond given in s. 6 does not discriminate between principal and interest, but no income tax has ever been claimed on the former. In this case the payment is called an annuity, but the substance of the matter must be looked at: *Nizam State Railway* v. *Wyatt.* (3) If income tax is paid on so much of each instalment as represents capital, there is a reduction pro tanto in the amount of capital repaid. The case is not that of the purchase of an annuity, for that amounts to the conversion of capital into income, while in this case the capital is not sunk, but is to be paid off gradually. *Foley* v. *Fletcher* (4) is an authority directly in favour of the plaintiffs, for there the plaintiff sold mines, part of the purchase-money being paid at once, and the residue by instalments extending over thirty years; and it was held that the instalments were not chargeable with income tax under Sched. D. There may be matters that arose in that case that have been modified by subsequent decisions, but the principle remains that income tax is only chargeable on profits, and that capital is not liable, because in the payments made it is mixed up with profits.

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(1) [1902] 2 K. B. 413.

(2) [1897] 2 Q. B. 402.

(3) (1890) 24 Q. B. D. 548.

(4) (1858) 3 H. & N. 769.

[They referred to *Tennant* v. *Smith* (1); *London County Council* v. *Attorney-General.* (2)]

Sir R. B. Finlay, A.-G. (*S. A. T. Rowlatt* with him), for the defendant. The argument on behalf of the plaintiffs comes to this, that every terminable annuity must, for income tax purposes, be split up into two parts, the one applicable to the capital involved, and the other to interest. The question is what profit the recipient receives, and it is submitted that the profit is the full amount of each instalment as it is received. The Legislature taxes terminable annuities, and on the principles laid down in *Foley* v. *Fletcher* (3) this annuity is taxable. The principal sum has been sunk precisely as in the case of the purchase of an annuity in the market. In order to prevent a payment by annual instalments from being an annuity taxable under the Income Tax Acts, the difference between payments on account of capital and those on account of interest must be expressed in the instrument under which the instalments are payable. If this is expressed, it may be admitted that income tax would not be payable on the whole. In *Foley* v. *Fletcher* (3) the learned judges guarded against the idea of including such a case as the present. The Lord Chief Baron, at p. 780 of the report, says: "If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax"; and Bramwell B. at p. 782: "Were we at liberty to consider the case independently of express enactment, I should say that it would be reasonable to ascertain how much is the payment of principal, and how much of interest. But all speculation is at an end if the words and the meaning of the statute are plain"; and he pointed out that the statute imposes a duty on the whole of an annuity, without discriminating between that part of it which is repayment of principal and that which is interest. All that case decided was that the instalments paid in that case were towards payment of a debt, and were not an annuity within the purview of the Act.

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(1) [1892] A. C. 150.

(2) [1901] A. C. 26.

(3) 3 H. & N. 769.

VAUGHAN WILLIAMS L.J. In my judgment this appeal should succeed. I assent to a great deal that the Attorney-General has said about annuities, but it seems to me that the outcome of the argument left the case for the Crown in this position. It could not be said that every annual sum payable on a contract was necessarily an annuity within the Income Tax Acts. It had to be admitted that, in any case in which it appeared on the face of the contract that there was a debt existing of such a nature that it could be said that the contract was not to purchase an annuity, but a contract under which a debt was made payable by instalments, in such a case the Income Tax Acts would not apply to the whole sum payable by such annual instalments. It is not denied on behalf of the plaintiffs that the Income Tax Acts would apply in respect of so much of each annual payment as was not a repayment of an instalment of the antecedent debt, and it is not denied in this case that income tax is payable on so much of each annual instalment paid by the Secretary of State as consists of interest. The whole question is whether income tax is payable on that part of the annual payment which can be discovered from the terms of the contract to be a payment of an instalment towards the complete payment of the existing debt. In my judgment no income tax is payable in such a case. When I come to look at clauses 23 and 26, it seems to me that, there having come into existence a debt payable by the East India Government for the purchase of this railway, and there being an option to pay off the debt by annual instalments instead of by paying down a gross sum, the Government elected to take the former course. This mode of payment, though called an annuity, is really the purchase of the railway by annual instalments, plus the interest on the amount remaining unpaid. In

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my opinion no tax is payable on the annual payments made under this arrangement in so far as they are repayments of the purchase price of the railway. Under these circumstances I think that judgment should have been given for the plaintiffs, and that this appeal must be allowed.

STIRLING L.J. I am of the same opinion. The question for our consideration arises on a contract entered into between the East India Company and the Great Indian Peninsula Railway Company. It was thereby provided that at the expiration of a certain period the East India Company might give notice of their intention to purchase the railway. The payment of the purchase-money was to be made in London, but by clause 26 it was to be lawful for the East India Company, instead of paying a gross sum, to declare their option to pay an annuity, from the time when the gross amount would be payable, for a term of years, the rate of interest being determined in the manner pointed out in the clause. In the events that happened, the Government of the United Kingdom, which succeeded to the obligations and rights of the East India Company, gave notice of their intention to avail themselves of the option that I have mentioned. It is observable that the clause as to this option was for the benefit of the purchaser, for the sum to be paid was over thirty-four millions, and it was clearly an advantage to spread the payment over a number of years and to meet it out of the yearly revenue of the Government. The question that we have to decide is whether income tax is payable by the annuitants on the full amount of the annual payments, or only on so much thereof as represents interest.

The case of *Foley* v. *Fletcher* (1) has been much referred to in the course of the argument, and has been relied on by both sides. The principle there laid down as to the construction of the word "annuity" has never been departed from. All the learned judges who decided that case gave their opinions to the same effect. For instance, Pollock C.B. in his judgment says: "If we were at liberty to speculate on the matter, and could come to the conclusion that a part of the annual pay-

(1) 3 H. & N. 769.

ments is the price of the convenience of getting the payment postponed, we could not say that the payments are within the Act because a part of them consists of profit. These instalments are payments of money due as capital: the Act has made no provision for such a case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits." So Baron Bramwell: "But by 'An Act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices,' it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it." And Baron Channell: "I think that the words do not include instalments which are part of a capital sum. To hold that the instalments are liable to income tax would be in effect to tax that which is capital and not income." And again: "I am of opinion that the words 'all annuities, yearly interest of money, or other annual payments' do not include those payments which are in respect of the purchase-money of an estate, and are in the nature of capital and not of income." True it is that there are to be found observations in the judgments that seem to point in the opposite direction, as, for instance, in this passage in the judgment of the Chief Baron: "If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax." So far as that remark is concerned, it has not been confirmed by subsequent cases, for we have the authority of the decision in *Nizam State Railway* v. *Wyatt* (1) that the mere fact that a sum of money which is payable annually is designated an annuity is not conclusive, but that the real nature of the transaction must be looked at. If we look at the real nature of the transaction in the case before us, we find that the annual payments are made up of a sum on account of principal and a sum on account of interest. This appears on the face of the contract, and the proportion on each payment can be easily ascertained. In these circumstances we should not readily arrive at a conclusion that the proportion of capital in each payment is liable to income tax.

(1) 24 Q. B. D. 548.

I felt during the course of the argument a difficulty on the point suggested by the Attorney-General that, if the view we are taking of this case is correct, the same result must be arrived at in the case of every terminable annuity, and that it would be logically necessary to say that every annuity of that sort should be split up, and income tax only charged on that part of it which is interest. I feel the force of that argument, but the cases are not the same. In the case of the purchase of an annuity the Legislature has said in terms that the annuity shall be chargeable with income tax, and that has been recognised in the Courts. The case is different where it is apparent on the face of the transaction that each instalment covers payment of a principal sum as well as interest, and this case closely resembles that of the repayment by instalments of a loan, in which case it has been admitted that it is not the practice to tax any part of the instalments except that representing interest.

MATHEW L.J. I am of the same opinion. In my judgment the instalments payable under the agreement in this case are not chargeable with income tax as annuities in respect of their full amount. An annuity means generally the purchase of an income, and usually involves a change of capital into income, payable annually over a number of years. Has such a case any analogy with the present? Here we find that a lump sum is agreed upon as representing the capital value of the railway. If that sum were handed over to the persons entitled to it, and invested by them, the income from the investments would be taxed, and not the principal sum. That sum, by the terms of the contract, may be paid off by what is called an annuity—that is, by annual payments which in the aggregate will be equivalent to the payment of the capital sum and interest from time to time on the amount remaining unpaid. The option so to deal with the matter was for the benefit of those on whom the obligation to pay fell; and the intention would seem to be that those who received the money should be substantially in the same position whichever mode of payment was adopted. Under these circumstances it seems to me that the payments in respect of principal are not chargeable with income tax. I agree that the decision in *Foley* v. *Fletcher* (1), so far as it is not encroached on by subsequent cases, is ample authority for the conclusion at which we have arrived in this case, and that consequently the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *White, Borrett & Co.*
Solicitor for defendant: *Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

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KODAK, LIMITED, APPELLANTS; CLARK, RESPONDENT.

Revenue—Income Tax—Company resident in United Kingdom—Holding preponderating Majority of Shares in Company Abroad—Control—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case* 1.

An English company carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors, &c., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholder:—

Held, that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax under the first case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the profits of the foreign company.

Judgment of Phillimore J., [1902] 2 K. B. 450, affirmed.

APPEAL from the judgment of Phillimore J. on a case stated by Commissioners of Income Tax, reported [1902] 2 K. B. 450.

From the special case, which is fully stated in the report of the case in the Court below, it appeared that the appellant company is an English company, registered under the Companies Acts, and formed for the purpose of acquiring the business and property of the Eastman Photographic Materials Company, Limited, which was also an English company, and not less than 95 per cent. of the shares of an American company, called the American Eastman Kodak Company, which was a subsisting company according to the laws of the State of New York. George Eastman had previously entered into an agreement for the purchase of the English company, the Eastman Photographic Materials Company, Limited, and the Kodak Company acquired from him the whole of the business of that company, and also a large number of shares in the American Eastman Kodak Company, amounting to 98 per cent. of the total number of shares of that company. There were, however, thirty shareholders, holding 818 shares of the American Eastman Kodak Company, whose shares were not acquired by George Eastman, and who were and remained independent of the Kodak Company. Some of these 818 shares were held by the directors or trustees of the company as qualifying shares. By an agreement between George Eastman and Kodak, Limited, it was provided that he should act as joint managing director of the company. By the law of the State of New York, Kodak, Limited, was unable to exercise any other power in or control over the American Eastman Kodak Company than by its vote as a shareholder at the general meetings of that company. Kodak, Limited, appointed George Eastman and two others, all of whom were directors of the American Eastman Kodak Company, to be proxies and attornies to vote for and on its behalf at any meeting of the American company. Eastman had voted as proxy for Kodak, Limited, at a meeting of the American company, but Kodak, Limited, had never in fact controlled or interfered in the management or business of the American company, nor attempted to do so, and had never taken any part in the declaration of dividend by that company.

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(1) 3 H. & N. 769.

Kodak, Limited, had a number of shareholders resident in America who were entitled to such dividends as might be declared by it, and it had for its bankers in America the Rochester Trust and Safe Deposit Company. This company by direction of Kodak, Limited, received any dividends due to Kodak, Limited, from the Eastman Kodak Company, and retained such dividends in America, and a certain proportion of the sums so received by the bankers was utilised for the payment of dividends due to the American shareholders of Kodak, Limited.

The residue of the dividends had always been left with the Rochester Trust and Safe Deposit Company at the order of Kodak, Limited, and no moneys whatever attributable to the dividends coming to Kodak, Limited, from the Eastman Kodak Company had ever in fact been remitted to the United Kingdom.

It was contended on behalf of the company:—

1. That the business carried on by the Eastman Kodak Company was carried on in America, and neither wholly nor partly in the United Kingdom, and that there was no fact from which it could be found or held that the business was carried on in the United Kingdom, and, therefore, that no assessment could be made by or under the Income Tax Acts in respect of the profits of the business upon Kodak, Limited.

2. That the profits of the business of the Eastman Kodak Company were not the profits of Kodak, Limited.

3. That Kodak, Limited, had only such an interest in the business and profits of the Eastman Kodak Company as holders of shares in the latter company could have and no other; that they were entitled only to such profits as were converted into and distributed in the shape of dividends in respect of these shares and to nothing else.

4. That the dividends to which Kodak, Limited, were entitled in respect of shares in the Eastman Kodak Company were taxable only (at most and if at all) under case 4 or case 5 of s. 100, Sched. D, of the Income Tax Act, 1842, and not otherwise.

5. That the dividends upon the shares of Kodak, Limited, in the Eastman Kodak Company were taxable only (if at all) to the extent to which they were actually received in the United Kingdom, and that, as no part of any such dividends had been received in the United Kingdom in fact, Kodak, Limited, were not taxable in respect of any part of such dividends.

6. That as no part of the dividends had been constructively received in the United Kingdom, Kodak, Limited, could not be assessed in respect of any part of any such dividends.

7. That the Eastman Kodak Company and Kodak, Limited, were distinct and independent entities, and that the ownership by the latter of shares, even to the extent of 98 per cent. of the total shares in the former, did not make the business and profits of the former the business and profits of the latter, and that there was no evidence from which it could properly be found that the business or profits of the former were the business or profits of the latter, or that the business of the former was carried on or managed by the latter, and that the holding of shares was not such evidence.

It was contended on behalf of the surveyor :—

1. That Kodak, Limited, having their registered office in England, were liable to assessments upon their total profits, including those of the Eastman Kodak Company.

2. That if Kodak, Limited, were held to be chargeable under cases 4 or 5 of the Income Tax Act of 1842, Sched. D, s. 100, then that the whole of the dividends of the Eastman Kodak Company, if not specifically, were constructively received in the United Kingdom.

Paragraph 15 of the special case was as follows: "After hearing and fully considering the whole of the evidence adduced on behalf of the appellant company and the surveyor of taxes . . . . we found as a fact that the English company controlled the American company from England, and that the head and seat and directing power of the appellants' company are at the appellants' registered office in London . . . ."

Paragraph 16: "We therefore held as follows :—

"1. That the American company is carried on by and is the business of the appellants, and that the profits and business are technically the profits and business of Kodak, Limited.

"2. That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company . . . .

"4. That Kodak, Limited, is liable for its profits made in America under Sched. D, case 1 . . . ."

The question for the opinion of the Court was whether on the facts there was any evidence to justify these holdings, and whether such holdings were correct in point of law or erroneous.

Kodak, Limited, appealed from the decision of the Commissioners, and Phillimore J. gave judgment, allowing the appeal. (1)

The respondent appealed.

Sir R. B. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*S. A. T. Rowlatt*) with them), for the Crown. Under the first case of Sched. D, s. 100, of the Income Tax Act, 1842, income tax is chargeable on the net profits arising from a business; under the fifth case it is chargeable only upon the actual sums received in Great Britain. The authorities shew that profits of business are chargeable under the first case if the business is carried on either wholly or in part in Great Britain: in order that such profits may be chargeable under the fifth case, the business must be carried on exclusively abroad. It was held in *Colquhoun* v. *Brooks* (2) that a person resident in Great Britain, who was a partner in a business carried on exclusively in Australia, was liable to be assessed for income tax under the fifth case of Sched. D, and not under the first case. In *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (3) it was held that an English company, which owned a railway in Brazil, was liable to be assessed upon the net profits earned in Brazil under the first case, because the business was managed and controlled in this country, and therefore could not be considered as carried on exclusively abroad. It is submitted that the decision in the last-mentioned case applies to the present. It was applied to cases in which the facts were similar to those of the present in *Frank Jones Brewing Co.* v. *Apthorpe* (4), *United States Brewing Co.* v. *Apthorpe* (5), *St. Louis Breweries* v. *Apthorpe* (6), and *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (7) Upon the findings of the Commissioners this case clearly falls within the principle laid down in *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter*. (3) The only question with which this Court can deal

(1) [1902] 2 K. B. 450.

(2) (1889) 14 App. Cas. 493.

(3) [1896] A. C. 31.

(4) (1898) 15 Times L. R. 113.

(5) (1898) 4 Tax Cases, 17.

(6) (1898) 79 L. T. 551.

(7) (1899) 80 L. T. 395; 4 Tax Cases, 41.

is the question whether there is upon the facts stated in the special case any evidence to support the findings of the Commissioners. It is submitted that there is abundance of such evidence. It appears from the prospectus of Kodak, Limited, and the other documents referred to in the case, that the scheme, in pursuance of which that company was formed, was one by which an English company was to be formed in order to acquire the business of a previously existing English company, and not less than 95 per cent. of the shares of the American Eastman Kodak Company, for the express purpose of bringing under a single control all the Eastman Kodak businesses over the world, and for that purpose George Eastman, who was a director of both companies, was to be a managing director of Kodak, Limited, and to be appointed proxy to exercise the voting power of Kodak, Limited, at any meeting of the American company. It is submitted that an English company, which, like Kodak, Limited, in truth and in substance carries on business partly in this country and partly elsewhere, cannot escape from liability to income tax under case 1 by setting up the mere machinery of a nominally independent foreign company. Technically the American company may be a distinct entity, but the business is substantially that of the English company. On the assumption that the business and profits of the American company cannot technically be said to be the business and profits of Kodak, Limited, it is contended that, where there is a body abroad, whether a corporation or a group of individuals, who are in fact carrying on business and earning profits abroad as agents for a company which is carrying on business in this country, the latter are taxable on the profits so earned abroad. There is nothing to the contrary of that proposition in the decision in *Salomon* v. *Salomon & Co.* (1) In this case the facts and documents shew that there was in truth direct control of the business of the American company by Kodak, Limited, at any rate to some extent. Where an English company has the whole, or a controlling, interest in a foreign company, the business of that foreign company cannot be considered to be carried on exclusively abroad. Kodak, Limited, receives profits therefore from a business not exclusively carried on abroad, and consequently, according to the decision in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), is chargeable to income tax, upon the profits so received, under the first case. In *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (2), *St. Louis Breweries* v. *Apthorpe* (3), and *United States Brewing Co.* v. *Apthorpe* (4), the English company, as in the present case, did not hold all the shares in the American company.

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(1) [1897] A. C. 22.

[VAUGHAN WILLIAMS L.J. Those cases appear to have been dealt with on the footing that the Commissioners had by their findings stated the companies out of Court.]

It appears to have been open in those cases to the company to raise the point that there was no evidence to support the findings of the Commissioners.

[VAUGHAN WILLIAMS L.J. It was not found apparently in those cases that there were any really independent shareholders in the American companies, as there are in the present case.]

[They also cited *Bartholomay Brewing Co.* v. *Wyatt* (5); *Cesena Sulphur Co.* v. *Nicholson.* (6)]

Danckwerts, *K.C.*, and *Kerly*, for Kodak, Limited. It is submitted that the judgment of Phillimore J. is correct. It is not denied that, on sums actually received in England from the American company by way of dividend on the 98 per cent. of the shares held by Kodak, Limited, they are liable to income tax under the fifth case of Sched. D, but they are not liable under the first case. In the cases upon which reliance has been placed for the Crown it will be found, on looking at the facts, that the English company really owned the foreign business and all its assets; in some cases they were both legal and equitable owners of all the assets; in others they were legal owners of some of the assets and equitable owners of the rest; in other cases they were equitable owners of the whole. In those cases the English company really carried on the business abroad, and the foreign company only existed as its agent. In the present case upon the facts it is clear that the American company has a substantive independent existence and business of its own. It is found that there are thirty independent shareholders, holding 818 shares in that company. It is impossible in the face of that fact to hold that the American company is merely the alter ego of the English company. It has been urged that the English company "controls" the American company. But a fallacy may be involved by the use of that expression. There are various senses of the word "control." There is the control of a master over his servant; there is the control which a principal may be said to exercise over his agent; and in a sense there may be said to be control by the exercise of voting power. Kodak, Limited, may perhaps in that sense be said to have some control over the affairs of the American company; but not in any sense material for the present purpose. Such control as Kodak, Limited, may exercise over the American company is quâ shareholder in that company, not quâ company in England which is the principal of the American company. It would be as correct to say that the electors of a country control the Government. In the cases relied on for the Crown, the facts were held to shew control by the English company, as master or principal, over the foreign company as its servant or agent. There is no such control in the present case. Again, the counsel for the Crown has spoken of profits obtained by Kodak, Limited, in America. But shareholders do not earn or receive profits in that sense. They have no legal or proprietary interest in the property or the assets of the company. They have no individual interest in or title to anything but the dividends which may be declared. Their interest in the profits only arises when they are applied to dividends. The directors are not the servants or agents of the shareholders; they are officials called into existence in accordance with the articles of association, who have certain duties to perform in relation to the company and towards the shareholders. It is impossible to say that the trustees or directors of the American company acted as agents for, or servants of, Kodak, Limited. They had certain duties to perform towards that company as a shareholder as they had towards the independent shareholders. What was said by Lord Watson in giving judgment in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1) is fatal to the contention of the Crown. The ground upon which he put his judgment there was that the directors are the only people who can be said to manage and control the affairs of the company. The shareholders do not in that sense control the company.

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(1) [1896] A. C. 31.
(2) 80 L. T. 395; 4 Tax Cases, 41.
(3) 79 L. T. 551.
(4) 4 Tax Cases, 17.
(5) [1893] 2 Q. B. 499.
(6) (1876) 1 Ex. D. 428.

Sir R. B. Finlay, A.-G., did not reply.

VAUGHAN WILLIAMS L.J. The argument on behalf of the company is—that whatever may have been true in other cases, the fact is that in this case there is a body of shareholders, holding 2 per cent. of the shares of the American company, in contradistinction to the 98 per cent. of the shares held by Kodak, Limited. That they appear upon the face of the case to be a body of independent shareholders, and that under these circumstances it is impossible for the holders of the 98 per cent. of the shares to claim 98 per cent. or any proportion of the profits. Their right is said to be a right only to receive dividends, and whatever amount of control they may exercise it is the control of shareholders and of shareholders only, and they have no control either as masters or as principals. I think I may say, and that I ought to say, to save time, that this view is that which the Court thinks to be the right view, and I do not think that anything would be gained by further repetition of the view that I take, the result of which is that, in my opinion, the judgment of Phillimore J. should be affirmed.

STIRLING L.J. I agree.

MATHEW L.J. I also entirely agree.

Appeal dismissed.

Solicitors for appellants: *Kerly, Son & Verden.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. M.

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(1) [1896] A. C. 30, at p. 41.

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1903
Feb. 18.

[IN THE COURT OF APPEAL.]

HUNTER *v.* THE KING.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 54.

The suppliant effected an insurance on his life for 1500*l.* upon the terms that the annual premium should be 66*l.* 17*s.* 6*d.*, and that the insurers should in each year advance to him by way of loan the amount of 33*l.*, and that he should pay interest annually upon amounts so advanced and be personally liable to repay the same, and that the advances and interest thereon should be a first charge upon the policy. In each year the suppliant paid 33*l.* 17*s.* 6*d.* in cash in respect of the premium, and was debited with the remaining 33*l.* as a loan, and he paid interest annually in respect of those loans:—

Held (reversing the judgment of Phillimore J.), that the above-mentioned transaction did not amount to payment of an annual premium of 66*l.* 17*s.* 6*d.* by the assured within the meaning of s. 54 of the Income Tax Act, 1853, and therefore that the suppliant was only entitled under that section to deduct from the amount of his assessment to income tax the sum of 33*l.* 17*s.* 6*d.* which he had paid in cash.

Appeal from the judgment of Phillimore J. on a special case stated by consent in a petition of right.

The facts are fully stated in the report of the case in the Court below (1), to which the reader is referred; but for the purposes of this report the following statement is thought to be sufficient. On June 30, 1896, the suppliant effected an insurance on his life for 1500*l.* with an insurance company. By the terms of the policy it was in substance provided that the annual premium for the first seven years should be 66*l.* 17*s.* 6*d.*, and that 33*l.* of that premium should, if the assured so desired, be advanced by the insurers; and that every such advance should bear interest at the rate of 4 per cent. during the continuance of the advance, and that the advance and interest should be a first charge on the policy. In each of the first three years the suppliant paid 33*l.* 17*s.* 6*d.* in cash in respect of the annual premium, receiving on that payment a receipt for 66*l.* 17*s.* 6*d.* as the amount of one year's premium, and he was debited in the insurance company's loan register with 33*l*. The suppliant in each year paid interest at 4 per cent. upon the amount of the principal sums for the time being outstanding on the security of the charge on the policy. For the three years ending April 5, 1899, the suppliant was assessed to and paid income tax based on the assumption that he was entitled to deduct from his income for the purposes of assessment only the sum of 33*l*. 17*s*. 6*d*. in respect of the premium on the policy, and he claimed to be allowed the full sum of 66*l*. 17*s*. 6*d*. as a deduction under s. 54 of the Income Tax Act, 1853. The suppliant by the petition of right claimed repayment of 3*l*. 6*s*., being the income tax charged on the sum of 33*l*. for the three years in question.

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(1) [1902] 2 K. B. 255.

The question was whether he was entitled to deduct from his assessment the sum of 66*l*. 17*s*. 6*d*. as being the annual sum paid by him in respect of premium within the meaning of the Income Tax Act, 1853, s. 54.

Phillimore J. gave judgment for the suppliant.

Sir R. B. Finlay, A.-G., and *Rowlatt* (*Sir E. Carson, S.-G.*, with them), for the Crown. (1) The real transaction in this case was that the half of the premium was not paid, but credit was given for it on the terms that interest should be paid, and that the amount should be a charge on the policy moneys. The sum so allowed to remain unpaid on credit cannot be said to have been paid within the meaning of the 54th section of the Income Tax Act, 1853.

Sir E. Clarke, K.C., and *Danckwerts, K.C.* (*R. B. D. Acland* with them), for the suppliant. The effect of the transaction was, in substance, that the whole of the premium of 66*l*. 17*s*. 6*d*. was paid, and 33*l*. of that sum was returned to the assured on loan. If the assured had borrowed half the amount of the premium from another person, in order to pay the insurance company, there could have been no doubt that he would be able to deduct the whole of the premium under s. 54. It makes no substantial

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(1) The Attorney-General stated that the view of the Crown was that the remedy in such a case was not by petition of right, but on special case stated by the Income Tax Commissioners, but under the circumstances the Crown would waive that objection.

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difference that, instead of his borrowing the amount from a third party, the insurance company treated half of the premium as a loan to him. The suppliant has not only paid 33*l*. 17*s*. 6*d*. by way of premium, but he has burdened his income for the year with the interest on a further sum of 33*l*. The statute does not say that the premium must necessarily be paid in cash. It may, without an undue straining of language, be said to be paid by any transaction which is pecuniarily equivalent to the sum to be paid.

Sir R. B. Finlay, A.-G., for the Crown, in reply.

VAUGHAN WILLIAMS L.J. This case raises a very short and simple point. Sect. 54 of the Income Tax Act, 1853, provides that a person who has made an insurance on his life may deduct the amount of the annual premium paid by him for such insurance from the amount of any profits or gains in respect of which he is liable to be assessed under Scheds. D or E of the Income Tax Act. We have to determine whether under the circumstances of the present case a sum of 33*l*., which formed part of the annual premium on a policy of insurance, has been paid or not. The total premium was 66*l*. 17*s*. 6*d*., of which 33*l*. 17*s*. 6*d*. was paid in cash, and as to that no question arises. The question is whether the other half can be considered to have been paid by the assured. In my opinion it cannot. I think that the true nature of the transaction was that half of the premium was allowed to remain on credit on the terms that the assured should pay interest upon it at the rate of 4 per cent. In my judgment that does not amount to payment within the meaning of s. 54 of the Income Tax Act, 1853. I think the appeal must be allowed.

STIRLING L.J. and MATHEW L.J. concurred.

Appeal allowed.

Solicitors for suppliant: *Hunter & Haynes.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

[IN THE COURT OF APPEAL.]

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HUDSON, Appellant *v.* GRIBBLE (Surveyor of Taxes), Respondent.

BELL, Appellant *v.* GRIBBLE (Surveyor of Taxes), Respondent.

Revenue—Income Tax—Salary—Deductions—Contribution to Thrift Fund—Sum payable or chargeable by virtue of Act of Parliament—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146—*Manchester Corporation Act*, 1891 (54 *&* 55 *Vict. c. ccvii.*).

A municipal corporation were by a local Act empowered to establish a fund for the encouragement of thrift among their officers and servants, and with a view to providing a sum of money which, in the event of the retirement or death of any person in the service of the corporation, who had contributed to the fund, should be available for himself or his representatives, and to frame a scheme for that purpose. By a scheme framed by the corporation in pursuance of the Act, it was provided that persons in the service of the corporation should respectively contribute to the fund a certain percentage of their salaries, to be from time to time deducted from those salaries by the corporation. In accordance with the requirements of the Act, the scheme provided that the amount so contributed by each contributor should be repaid with interest to him, upon his retirement from the service of the corporation, or, in the event of his death in that service, to his personal representatives:—

Held, that amounts deducted in pursuance of the scheme from the salaries of persons in the service of the corporation did not come within the words "sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged," in the first rule of s. 146 of the Income Tax Act, 1842, and therefore they could not be deducted from the amounts of the salaries for the purpose of assessment to income tax under Sched. E.

Beaumont v. *Bowers*, [1900] 2 Q. B. 204, not followed.

Appeals from judgments of Phillimore J. in cases stated by Commissioners of Income Tax.

The first case so far as material was as follows.

By s. 5 of the Manchester Corporation Act, 1891 (54 & 55 Vict. c. ccvii.), the mayor, aldermen, and citizens of the city of Manchester were empowered to establish a fund for the encouragement of thrift amongst the officers and servants of the corporation, and with a view of providing a sum of money

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which, in the event of the retirement or death of any person in the service of the corporation who had contributed to the fund, should be available for himself or his representatives, such fund to be called the "Thrift Fund." They were further empowered to prepare and approve by resolution a scheme for the establishment of such fund, determining by any such scheme (inter alia): what classes of persons should be entitled to contribute to, and participate in the benefit of, the fund, and to what extent such contribution should be payable by persons entering, or who should have entered, the service of the corporation after the passing of the Act, and also upon what terms and conditions persons in the service of the corporation at the time of the passing of the Act should on their own application be admitted to the benefit of the fund; what (if anything) should disqualify any person from becoming a contributor and participating in the benefit of the fund; under what circumstances any person having been a contributor should cease to continue a contributor and to be entitled to participate in the benefits of the fund; what proportion (if any) of his contributions, and of the interest thereon, such last-mentioned person should be entitled to receive; what proportion (if any) of the additions made by the corporation to the fund should be payable to the representatives of any member in the event of his dying before he became entitled to any benefit under the scheme on resignation or retirement; the percentage of salaries or wages which should be payable to the fund; the age at which, or other circumstances in which, a person should become entitled to benefit under any scheme; the payment to a person entitled to benefit under any scheme either by way of a gross sum or by way of an annuity; the rate at which interest, simple or compound, should be calculated in respect of moneys contributed to the fund by the contributors and the corporation respectively; under what circumstances temporary advances might be made to contributors.

By s. 7 of the Act it was required that any scheme prepared by the corporation for the establishment of the Thrift Fund under the Act should contain the following provisions:—

"Any contributing member retiring bonâ fide from the service of the corporation of his own accord before attaining the age prescribed by the scheme, and not to escape dismissal for fraud, dishonesty, or misconduct involving pecuniary loss to the corporation, or leaving the service of the corporation in consequence of reductions or alterations in the establishment, or from his services being discontinued . . . . shall be entitled to receive back the whole amount of his own contributions with such interest as shall have accrued thereon under the scheme. The representatives of any contributing member, who, not having been guilty of fraud, dishonesty, or misconduct involving pecuniary loss to the corporation, shall die before he becomes entitled to any benefit under the scheme on resignation or retirement, shall be entitled to receive back the whole contributions of such member with such interest as shall have accrued thereon under the scheme. Any contributing member dismissed from the service of the corporation for fraud, or dishonesty, or misconduct involving pecuniary loss to the corporation, or retiring to escape dismissal from any of these causes, shall at the discretion of the corporation forfeit all or any part of his contribution and the interest thereon, and lose all benefits from the fund except such return (if any) as may at such discretion be made to him out of his own contributions and the interest thereon."

By s. 9 it was required that the corporation should, at the end of each half-year after the establishment of the Thrift Fund, contribute thereto, out of the rate or revenue upon which the salary or wages of each contributing member was or were chargeable, a sum equal to one-third of the sum which during the same half-year had been contributed thereto by such contributing member.

By s. 12 the corporation was not to be bound to recognise any assignment or trust relating to any contributions of any contributing member of the Thrift Fund.

On August 3, 1892, the corporation, by a resolution of the council, approved and adopted a scheme for the establishment of, and did thereby establish, the Thrift Fund.

The first article of the scheme provided that every person entering the service of the corporation after August 5, 1891—

the date of the passing of the Act—should contribute and pay to the Thrift Fund a certain percentage of his salary or wages, which contribution or payment might be deducted pro ratâ by the corporation from time to time as and when the salary or wages should become payable, and no such person should cease to so contribute to the Thrift Fund while in the service of the corporation.

By art. 2 of the scheme, "Any person who on the 5th August, 1891, was in the service of the corporation, whatever his remuneration . . . . may, by an application in writing under his hand, be admitted to the benefit of the Thrift Fund, and become and continue to be a contributor in the same manner and upon the same terms and conditions in every respect as if he were one of the persons to whom article 1 of the scheme applies: provided that no person who shall have been so admitted and shall so become a contributor shall cease to contribute to the Thrift Fund while in the service of the corporation."

By art. 6 it was provided that for the purposes of the Act and the scheme the age prescribed by the scheme for retirement should be sixty-five years, or any earlier age at which it should be proved to the satisfaction of the corporation that a person was incapable for the performance of his duty by infirmity of mind or body.

By art. 7 it was provided that an account should be kept by the corporation in favour of each contributor to the Thrift Fund, and in the event of his retirement from the service of the corporation on or after his attaining the age prescribed by the scheme, or in the event of his death before attaining the age prescribed by the scheme, he, or (in case of death) his representatives, should be entitled to receive the whole amount then standing to his credit, including all contributions of the corporation and compound interest at the rate of 4 per cent. per annum on his own contributions and on the contributions of the corporation. The provisions required by s. 7 of the Act were also incorporated in and set out by the scheme.

The appellant Thomas Hudson, the deputy town clerk of the city of Manchester, was in the service of the corporation prior to and on August 5, 1891, and therefore came within the meaning of art. 2 of the scheme, and it was optional with him to apply to be admitted to the benefit of the Thrift Fund. Accordingly, on August 31, 1892, he made an application in writing under his hand to be so admitted, and he thereupon became and has since continued to be a contributor to the fund, and under the provisions of the scheme he cannot cease to contribute to the fund while in the service of the corporation.

On April 11, 1901, he appealed against an assessment to income tax of 800*l.* made upon him for the profits of the office or employment held by him, and claimed to be allowed a deduction in respect of his contributions to the fund. He relied on s. 146 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and the rules for charging the duties under Sched. E. By the first rule it is provided that the duties should be annually charged on the persons exercising the offices or employments of profit mentioned in the schedule for all salaries, fees, wages, perquisites, or profits accruing by reason of such offices or employments, "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged." By the ninth rule it is provided that, in estimating the duty payable for any such office or employment of profit, all official deductions and payments made upon the receipt of the salaries and profits thereof shall be allowed to be deducted, provided that a due account thereof be rendered to the Commissioners and proved to their satisfaction. The appellant contended that under these rules he was entitled to deduct the amount of his contribution to the Thrift Fund from his salary, and that he was only chargeable on the amount of his salary after making such deduction.

The Commissioners, after hearing the appeal, refused to allow the appellant's claim and confirmed the assessment, but stated this case for the opinion of the Court.

The facts in the second case were similar to those in the first, with the exception that the appellant Bell was taken into the service of the corporation of Manchester in 1898 after the establishment of the scheme.

In the first case Phillimore J. gave judgment for the Crown, holding that, as the salary of the appellant Hudson had become subject to the deductions made under the scheme by reason of his voluntary application to be admitted to the benefits of the Thrift Fund, the sums so deducted could not be said to be payable or chargeable on his salary by virtue of any Act of Parliament. (1)

In the second case he gave judgment for the appellant Bell, thinking himself bound by the judgment in *Beaumont* v. *Bowers*. (2)

Asquith, K.C., and *Ryde*, for the appellants. (3) The sums deducted from the appellants' salaries in pursuance of the scheme were within the words "other sums payable or chargeable on the same by virtue of an Act of Parliament." The Manchester Corporation Act, 1891, fetters the corporation at every step with regard to the constitution of the fund, and the regulations under which it shall be administered; and it is submitted that, when once the scheme came into existence, it would be impossible for the corporation and a person entering into their service to contract themselves out of it. Under these circumstances the sums deducted from salaries under it may be said to be payable by virtue of an Act of Parliament. It is true that the appellant in the first case came voluntarily under the scheme in the first instance, but, once having done that, he could not withdraw, but was compelled to submit to the deductions during the rest of his service with the corporation. No substantial distinction can be drawn between *Beaumont* v. *Bowers* (2) and the present case on the ground that in the former case the deductions were directed to be made by the Poor Law Officers' Superannuation Act, 1896, itself, whereas here they are directed to be made by the scheme approved in pursuance of the Act. The conjoint effect of the Manchester Corporation Act, 1891, and the scheme made under it is to make the contributions under the scheme sums payable or chargeable on the salaries of the appellants by virtue of an Act of Parliament within the meaning of the first rule of Sched. E of the Income Tax Act, 1842.

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(1) See [1902] 2 K. B. 298.

(2) [1900] 2 Q. B. 204.

(3) The term "appellants" is used throughout with reference to the position of the parties in the Court below.

It may be argued that the "other sums" contemplated by the words of the first rule relating to deductions must be sums ejusdem generis with duties, i.e., in the nature of taxes; but it is submitted that there is really no ground for the application of the ejusdem generis rule to those words. The cases in which salaries have been charged with taxes are very few, and it seems doubtful whether any such taxes were really in force at the date of the Income Tax Act, 1842. It is difficult to see what "other sums" could be meant, if the meaning is to be limited as suggested.

Independently of the words of the rule allowing deductions, and assuming that this case does not come within those words, income tax is not chargeable on the amount deducted from the salary under the scheme. The Income Tax Act, 1842, provides for a tax on income, i.e., profits and gains accruing during the year: see per Lord Macnaghten in *London County Council* v. *Attorney-General*. (1) The portion of the salary which is deducted therefrom, and which never comes into the hands of the person to be charged during the year, cannot be said to be profit accruing by reason of the employment during the year. It is immaterial for this purpose that the sum deducted may ultimately come to the hands of the person employed by the corporation at some future date by way of superannuation fund. The taxable subject is the income during the year, which means what the party to be charged actually receives during the year.

Sir R. B. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*Rowlatt* with them), for the Crown. The sums deducted from salaries under the scheme are not sums payable or chargeable on them by virtue of any Act of Parliament. The provisions of the Manchester Corporation Act, 1891, were necessary in order to authorize the corporation to establish the scheme, and to contribute to the fund, which would otherwise have been ultra

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(1) [1901] A. C. 26, at p. 37.

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vires on their part. But, when the scheme is established, it really stands on the same legal footing as any similar scheme set on foot by a company or an individual employer for the purpose of providing pensions or a superannuation fund for employees. The deductions are made not by virtue of the Act of Parliament, but by virtue of the contract of employment made between the corporation and persons who enter into their employ. The "duties or other sums" contemplated by the first rule are charges in the nature of taxes. There were duties imposed on salaries by 49 Geo. 3, c. 32, 6 Geo. 4, c. 9, and 6 & 7 Will. 4, c. 97. These duties were repealed by 39 & 40 Vict. c. 16, s. 12, but to some extent restored by 40 & 41 Vict. c. 10, s. 1. No such duties appear to be in operation at the present day, but their existence at the date of the Income Tax Act, 1842, may afford a reason why the words in question were inserted in the first rule. The language is appropriate to such deductions as those, but not to sums deducted by way of forming a pension or superannuation fund for employees. These sums cannot be said to be really and bonâ fide paid and borne by the party to be charged; for the effect of the scheme is merely to set aside a portion of the salary or wages in order that it may be paid to the employee at a later date with interest. If the argument on the other side is correct, a great part of s. 54 of the Income Tax Act, 1853, was unnecessary and must have been inserted by mistake. This case is distinguishable from *Beaumont* v. *Bowers* (1), because there the deductions were prescribed by the Act of Parliament itself; but it is submitted that that case was wrongly decided. The cases before the Court differ, for in one case the service commenced before, and in the other after, the scheme was established. The former is of course an a fortiori case, but, on the grounds before stated, it is submitted that in both cases the deductions claimed are inadmissible.

Asquith, K.C., for the appellants, in reply.

VAUGHAN WILLIAMS L.J. In my judgment the decision of Phillimore J. in *Hudson* v. *Gribble* (2) is right and should be

(1) [1900] 2 Q. B. 204.

(2) [1902] 2 K. B. 298.

Vaughan Williams L.J.

affirmed. The question which we have to decide is whether or not certain sums of money, which were deducted by the corporation of Manchester from the salaries or wages of persons employed by them in accordance with the scheme framed under the Manchester Corporation Act, 1891, come within the words of the first rule of Sched. E of the Income Tax Act, 1842, which have been relied on by the appellants. That rule provides that the duties shall be annually charged on the persons exercising the offices or employments of profit mentioned in the schedule for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices or employments "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged." The question is whether the sums deducted by the corporation of Manchester as before mentioned under their scheme come within that part of the rule which defines the nature of the deductions permissible under it. In my judgment they do not. They do not appear to me to fall within either part of the definition given by the rule. I do not think they are "duties or other sums payable or chargeable by virtue of any Act of Parliament" on the salaries or wages of the appellants, or sums which have been "really and bonâ fide paid and borne by the party to be charged." I will deal first with the latter part of the definition contained in those words, as it raises a point which may be disposed of very shortly. I do not think that the sums in question can be said to have been really and bonâ fide paid or borne by the party to be charged for the following reasons. By the terms of the scheme, although payment of these sums was postponed, they never ceased to be the property of the persons from whose salaries or wages respectively they were deducted. Without going through all the sections of the Act, and the scheme made under it, it is plain that the intention both of the Act and scheme is that the employee, unless guilty of certain misconduct or offences mentioned in the Act, shall be entitled, on retiring from the service of the corporation, to receive back the whole of his own contributions with any interest which may have accrued thereon under the scheme; and further that, in the event of his death in the service of the corporation, his representatives shall be similarly entitled. I think that under these circumstances all that can be truly said as to these sums is that payment of them was postponed, and that it would not be true to say that the persons from whose salaries they were deducted have really and bonâ fide paid and borne the same. Referring now to the first part of the definition, I do not think that the words cover a deduction of the kind here in question. I am disposed to agree with the argument on behalf of the Crown to the effect that the words "duties or other sums payable or chargeable on the same by virtue of any Act of Parliament" contemplate matters in the nature of taxes, such as were imposed by the Acts to which we have been referred, and that the meaning is limited to such matters. It is not, however, necessary so to hold for the purposes of the present case. It is sufficient to say that, whatever may be the exact meaning of the words, they do not include sums such as those here in question. No man is bound to enter into the employment of the corporation. A person, who chooses to accept employment in the service of the Manchester Corporation, voluntarily enters into an employment which he knows will involve as one of its terms an agreement by him that a certain percentage shall be deducted from his salary or wages and appropriated to purposes defined by the scheme. Under these circumstances it is not in my judgment true to say that these sums are "payable or chargeable by virtue of an Act of Parliament" on his salary. Before leaving this part of the case I should wish to say generally that in my view the object of this part of the rule was to prevent double taxation.

The counsel for the appellants put forward an argument which was really quite independent of the words with which I have been hitherto dealing. He said that the Income Tax Act, 1842, is an Act whereby "income" only is intended to be taxed, in support of which proposition he cited what was said by Lord Macnaghten in *London County Council* v. *Attorney-General* (1): and he contended that the sums in question were not income, because they never came into the hands of the appellant; that his true income, upon which he ought to be taxed, was his salary less the amount deducted from it under the scheme. In my opinion that argument is not well founded. I do not think that, to use the old language of pleading, it would be correct to say that, as to the amounts deducted from the appellants' salaries, the corporation never were indebted to them. I think that, if sued for these amounts, the corporation would have to admit indebtedness, and to justify the deductions on the ground that the amounts deducted were appropriated and paid by the authority of the appellants in accordance with the contracts entered into between them and the corporation. I do not think it necessary to go at length into all the arguments which have been put forward in this case, but I should like to call attention to the argument which arises upon s. 54 of the Income Tax Act, 1853. It is plain that the case with which we are now dealing is not covered by the words of that section. If, as contended, it is covered by the words of the first rule which I have discussed, it would follow that the whole of s. 54, except that part of it which deals with certain voluntary payments made by way of premiums on insurances, was absolutely unnecessary. In my judgment that is not so, and I do not think that the Legislature made a mistake when they thought it necessary to insert that section. I think I ought to say that, if my view of the construction of the first rule is correct, it seems to me to follow that the view taken in *Beaumont* v. *Bowers* (1) was wrong. I cannot, speaking for myself, see that any substantial distinction between that case and the present can be based on the suggestion that the deduction there was one directly prescribed by the Poor Law Officers' Superannuation Act, 1896, or that the deduction in that case was a compulsory deduction in any sense which is not equally applicable to the present case. It is not however necessary to decide the question whether that decision was correct one way or the other. It is enough to say that in the present case the sums in question do not fall within the words of the first rule defining the deductions

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(1) [1901] A. C. 26.

(1) [1900] 2 Q. B. 204.

which may be made, on the two grounds which I have mentioned, namely, that they are not sums "payable or chargeable on the same by virtue of any Act of Parliament," and that they are not sums "really and bonâ fide paid and borne by the party to be charged." For these reasons I think the appeal in the first case must be dismissed, and that in the second allowed.

Stirling L.J. I am of the same opinion. I do not think that the deductions claimed are in respect of sums which have been "really and bonâ fide paid and borne by the party to be charged" within the meaning of the first rule of Sched. E of the Income Tax Act, 1842. These sums have been deducted by the Manchester Corporation from the salaries of the appellants in pursuance of a scheme framed by the corporation under the Manchester Corporation Act, 1891; and it is contended that they therefore come within the words of the rule as being sums payable or chargeable on those salaries by virtue of an Act of Parliament, and which have been really and bonâ fide paid and borne by the parties to be charged. But the Act of Parliament under which the scheme was framed, and which authorized these deductions, itself provides that the sums so deducted shall be retained by the corporation and shall in their hands bear interest; and by s. 7 it is enacted that the terms of the scheme must provide that, on a person in the service of the corporation retiring from that service, he shall be entitled, subject to certain qualifications in the case of misconduct, to have his own contributions returned to him with interest, or, if he dies in the service of the corporation, his representatives shall, subject to the like qualifications, be similarly entitled. It is obvious that, though the amounts so deducted are not immediately paid to the person employed, they remain his property to a great extent. In these circumstances I do not think that they can be said to have been "really and bonâ fide paid and borne" by him. I also agree with my brother Vaughan Williams that in truth these are not sums payable or chargeable by virtue of an Act of Parliament. They are really payable because the person concerned has thought fit voluntarily to enter into the service of the Manchester Corporation.

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MATHEW L.J. I am of the same opinion. An argument was presented to us by Mr. Asquith, which was founded on the word "income." He argued that, the tax imposed by the Income Tax Act, 1842, being a tax on income, it could only apply to income which actually reached the hands of the taxpayer within the year; and therefore income tax was not payable on the sums deducted under the scheme in the present case. He carried that argument so far as to insist that, where, by a term of a contract of service entered into voluntarily, and not in pursuance of any Act of Parliament, it was provided that the employer might defer payment of a portion of the salary from time to time payable to a person in his employ, for purposes similar to those of the scheme in the present case, the portion, of which payment was so deferred, would not be income taxable under the Income Tax Act, 1842. The consequences of that contention would be very remarkable. Suppose that a marriage settlement contained a covenant by the husband to set aside a certain proportion of his income every year, and invest the same on certain trusts for the benefit of his family; it would follow, if the argument put forward is correct, that the sums so set aside would not be taxable. Such a conclusion would, I think, be impossible.

With regard to the meaning of the words in the first rule of Sched. E which have been relied upon, it is contended for the Crown that they were inserted merely to provide for the deduction of duties or other sums payable or chargeable by virtue of an Act of Parliament, which were in the nature of other taxes. On reference to the statute book, it appears that there were in certain cases taxes on salaries which would answer the description of "duties payable or chargeable by virtue of an Act of Parliament." Although it appears that experience can supply no examples of such taxes in operation at the present day, the use of the word "duties" is strong to indicate that the sums intended to be dealt with were sums

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imposed upon an individual by Act of Parliament without his consent. It is true that the sums here in question were deducted in accordance with a scheme framed under an Act of Parliament; but the analogy between them and sums deducted by employers out of the wages of persons in their employment, in pursuance of a scheme of the same kind established by them on their own account, is as close as can be. A person can refuse to enter into an employment of which it is a term that he shall agree to such deductions. If he does enter into such an employment, his position is that of a person who has voluntarily agreed to the deductions. The person, who has entered into the employment of the corporation before the establishment of the scheme, is not bound to submit to these deductions, and, if he exercises his option to be admitted to the benefit of the scheme, he cannot be said to have been charged with them by virtue of an Act of Parliament. In the case of a person who enters upon the service of the corporation after the establishment of the scheme, it is equally clear in my opinion that, inasmuch as he is not obliged to enter into their service, he voluntarily submits to the deductions. Again, by the terms of the Act of Parliament and the scheme, the person from whose salary or wages deductions have been made in pursuance of the scheme is to get back any contributions which he has made upon retiring from the service. The scheme really provides for deferred payment in respect of the sums deducted. That being so, I do not think it can be said that those sums are really and bonâ fide paid and borne by the persons from whose salary or wages they are deducted. For these reasons I agree that the appeal in one case must be dismissed, and in the other allowed.

Judgment accordingly.

Solicitors for appellants: *Austin & Austin, for Thomas Hudson, Manchester, and R. Bell, Manchester.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

C. A.

1903
Feb. 16.

[IN THE COURT OF APPEAL.]

KIRKWOOD *v.* CARROLL AND ANOTHER.

Bill of Exchange—Promissory Note—Joint and Several—Proviso as to giving Time to either Party—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 83.

The plaintiff sued as holder of a document described as a joint and several promissory note, which provided for the payment of certain money by instalments, the whole to become due on default in payment of any one instalment. It contained the following clause: "No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party":—

Held, that the document was a valid promissory note within the meaning of s. 83, sub-s. 1, of the Bills of Exchange Act, 1882.

Kirkwood v. *Smith,* [1896] 1 Q. B. 582, overruled.

Yates v. *Evans,* (1892) 61 L. J. (Q.B.) 446, approved.

APPEAL from a decision of Wright J. upon a special case raising a question of law for the opinion of the Court.

The action was brought to recover 125*l.* from the defendants as makers of a joint and several promissory note for that amount, and the case stated that on January 24, 1901, the defendants signed and handed to the plaintiff an instrument in writing purporting to be a promissory note in favour of the plaintiff, which was in the following terms:—

"125*l.*

"We jointly and severally promise to pay Mr. John Kirkwood (carrying on business in the name or style of the Provincial Union Bank) or order the sum of 125*l.* for value received by instalments in manner following, that is to say, the sum of 5*l.* on Thursday, the 31st day of January inst., and the sum of 5*l.* on the Thursday in every succeeding week until the whole of the said 125*l.* shall be fully paid, and in case default is made in payment of any one of the said instalments the whole amount remaining unpaid shall become due and payable forthwith. No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party."

The document was witnessed.

The plaintiff was the holder for value of the instrument, which was stamped with a 2*s.* stamp. The defendants made default in payment of the instalment due on January 31, 1901.

The defendants contended that the instrument was not duly stamped, and could not be given in evidence or be available for any purpose whatever, and submitted that, owing to the last clause contained in it, it was not a promissory note and could not be sued on as such.

The questions submitted for decision were: (1.) Whether the instrument was a promissory note. (2.) Whether it was duly stamped. Wright J. held, upon the authority of *Kirkwood* v. *Smith* (1), that the document was not a promissory note within the meaning of the Bills of Exchange Act, 1882, but that it was sufficiently stamped. Both parties appealed.

J. E. C. Adams, for the defendants. This instrument is not a promissory note within the meaning of the Bills of Exchange Act, 1882. On that point the decision of the Divisional Court in *Kirkwood* v. *Smith* (1), where the facts were identical, is a clear authority and should be followed. The note contains in the last clause something more than "a pledge of collateral security with authority to dispose thereof" within the meaning of s. 83, sub-s. 3, of the Bills of Exchange Act, 1882. The last clause is an agreement, and the instrument is at best a promissory note and an agreement, requiring both a bill stamp and an agreement stamp. It is therefore insufficiently stamped. The only alternative is that the whole instrument is an agreement, in which case also it is not duly stamped; for the 2*s.* stamp upon it is appropriated to bills, and is therefore, by virtue of s. 10 of the Stamp Act, 1891, not available for an agreement. [He also cited *Ashling* v. *Boon.* (2)]

W. E. Vernon, for the plaintiff. [He was directed to confine his argument to the first point.] The instrument is a promissory note within the Bills of Exchange Act, 1882, and is properly sued upon as such. The decision in *Kirkwood* v. *Smith* (1) is wrong, and should be overruled; the previous decision of *Yates* v. *Evans* (2) was not cited, and is directly contrary to it. By s. 97, sub-s. 2, of the Bills of Exchange Act, 1882, which was not referred to in *Kirkwood* v. *Smith* (1), the rules of the common law are to continue to apply to bills of exchange and promissory notes; but upon looking at the judgment it is clear that that case was decided upon s. 83, sub-s. 3, of the Act, which says that "a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." The Court treated that sub-section as exclusive; but to do so is to give no effect to the provisions of s. 97, sub-s. 2. The proper test to apply is to see whether the instrument is a promissory note within s. 83, sub-s. 1, of the Act, and this instrument is an unconditional promise to pay complying with every requirement of that sub-section. By s. 89, sub-s. 1, the provisions of the Act as to bills of exchange apply, with the necessary modifications, to promissory notes. A promissory note may therefore, under s. 9, be made payable by instalments, with a provision that the whole shall become due on default in payment of any instalment.

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(1) [1896] 1 Q. B. 582.

(2) [1891] 1 Ch. 568.

EARL OF HALSBURY L.C. I am of opinion that the plaintiff's appeal must be allowed. The addition to this promissory note does not qualify it, and I doubt whether the addition is in any proper sense operative. The document contains a promise to pay a certain sum of money by certain instalments, and it seems to me impossible to suggest that it is anything else but a promissory note within the meaning of the Bills of Exchange Act, 1882. The case of *Kirkwood* v. *Smith* (1) was decided without any reference to the other sections of that Act, and cannot any longer be regarded as an authority. The case of *Yates* v. *Evans* (2) was, in my opinion, quite rightly decided.

(1) [1896] 1 Q. B. 582.

(2) 61 L. J. (Q.B.) 446.

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LORD ALVERSTONE C.J. I am of the same opinion.

SIR F. H. JEUNE P. I agree.

Appeal of plaintiff allowed.
Appeal of defendants dismissed.

Solicitor for both parties: *J. G. Lincoln.*

W. J. B.

C A.
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Feb. 16.

[IN THE COURT OF APPEAL.]

KOLCHMANN *v.* MEURICE.

Practice—Charging Order—Interest in Shares charged with Judgment Debt—Application to enforce Charge by Order for Sale of Shares—Jurisdiction—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24—*Order* XLVI., *r.* 1—*Leave for Service out of Jurisdiction—Action to enforce Charging Order—Order* XI., *r.* 1 (*e*)—*Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *ss.* 14, 15.

Where an order has been made charging a judgment debtor's interest in shares with the amount due on the judgment under the Judgments Act, 1838, that order cannot, under s. 24 of the Judicature Act, 1873, be enforced by an order made in the original action.

Leggott v. *Western,* (1884) 12 Q. B. D. 287, followed.

Leave cannot be given for service of a writ out of the jurisdiction under Order XI., r. 1 (*e*), in an action to enforce such a charging order.

APPEALS from two orders made respectively by Walton J. and Joyce J., refusing applications by the plaintiff as after mentioned.

The plaintiff having recovered judgment for a sum of money in an action in the King's Bench Division against the defendant, who resided abroad, an order absolute was obtained by the plaintiff under Order XLVI. and the Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 14, 15, charging the defendant's interest in certain shares in a limited company in England standing in his name with the amount due on the judgment. The judgment remaining unsatisfied, the plaintiff applied by summons at chambers for an order to enforce the charging order by sale of the shares. Walton J., on the authority of *Leggott* v. *Western* (1), refused the application.

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(1) 12 Q. B. D. 287.

The plaintiff then applied at chambers to Joyce J. for leave to issue a writ for service on the defendant out of the jurisdiction and to serve the same under Order XI., r. 1 (*e*), in an action in the Chancery Division, claiming an order to enforce the charging order by a sale of the shares. On the authority of *Moritz* v. *Stephan* (1) Joyce J. refused the application.

With the sanction of Appeal Court No. 2, the appeal against the order of Joyce J. was brought on with the appeal against the order of Walton J. in Appeal Court No. 1.

A. Beddall, for the plaintiff ex parte. (2) It was held in *Leggott* v. *Western* (3) that there is no power under s. 24, sub-ss. 4, 7, of the Judicature Act, 1873, to make an order enforcing the charging order by way of relief in the original action, but that the charge must be enforced by a fresh action. It is submitted that that case was not rightly decided. [He cited on this point *Eden* v. *Naish* (4); *Smith* v. *Cowell* (5); *Salt* v. *Cooper* (6); *In re Gaudet Frères Steam Ship Co.* (7)]

If this is not so, it is further submitted that leave for service of a writ out of the jurisdiction in an action to enforce the charging order may be given under Order XI., r. 1 (*e*). A judgment gives rise to a legal obligation to satisfy the amount of it, which may be regarded in law as being an obligation ex contractu: Com. Dig. Title Debt, A 2; *Williams* v. *Jones*. (8) The proposed action may therefore be regarded as founded on a breach of contract. *Moritz* v. *Stephan* (1) is not binding on this Court.

VAUGHAN WILLIAMS L.J. I think that both these appeals must be dismissed. With regard to the appeal from Walton J., it appears that, notwithstanding the lapse of a long period since the passing of the Judicature Act, 1873, during which applications of this kind might have been made, there is no trace of any attempt to apply the procedure sought to be

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(1) (1888) 36 W. R. 779.

(2) The defendant did not appear in the action.

(3) 12 Q. B. D. 287.

(4) (1878) 7 Ch. D. 781.

(5) (1880) 6 Q. B. D. 75.

(6) (1880) 16 Ch. D. 544.

(7) (1879) 12 Ch. D. 882.

(8) (1845) 13 M. & W. 628.

Vaughan Williams L.J.

applied in the present case, save in the case of *Leggott* v. *Western.* (1) I think that fact alone furnishes a very strong reason for doubting whether there can be any jurisdiction conferred by the Judicature Act to apply such a procedure. I am not satisfied with the explanation suggested, namely, that the decision in *Leggott* v. *Western* (1) was acquiesced in, because it was not thought worth while to question it. What is the procedure which it is sought to apply? An order having been obtained under 1 & 2 Vict. c. 110, charging the defendant's interest in certain shares with the amount of the judgment recovered in an action, it is suggested that, without any further proceeding than a summons asking that effect may be given to the charging order, an order may be made to enforce the charge by sale of the shares. I do not think that is so. In my opinion the case of *Leggott* v. *Western* (1) was rightly decided and is conclusive on that point. It appeared to me from what the plaintiff's counsel said, in answer to a difficulty suggested by my brother Stirling, that he himself felt that, in the case of a charging order limited, as this order is, to the defendant's interest in the shares, it would be practically very difficult, if not impossible, to work out such an order as he is asking us to make. With regard to the appeal from the refusal of Joyce J. to grant leave to serve a writ on the defendant out of the jurisdiction, the only clause of Order XI., r. 1, which can be put forward as covering this case is clause (*e*) It is only necessary to read that clause in order to see that it can have no application whatever to this case. It is quite impossible to suppose that the proposed action is one founded on a breach of a contract within that clause.

STIRLING L.J. I am of the same opinion. In this case, the plaintiff having recovered judgment for a sum of money in the King's Bench Division, an order was obtained under 1 & 2 Vict. c. 110, charging the defendant's interest in certain shares in a limited company in England, which stood in his name, with the amount due upon the judgment. We are asked to make an order in the original action that the charging order shall be enforced by sale of the shares. I do not think that we can properly make such an order. The order could only be for sale of the defendant's interest in the shares; and, in the absence of any evidence to shew what that interest consisted of, it would be impossible to make an effective order, so as to produce the desired result, namely, a transfer of the shares into the name of the plaintiff or some other person who could make a title upon a sale. Quite apart from the question whether such an order can be made in the original action, I think that any order the Court could make would be futile. But, further, I do not see my way to differing from the decision in *Leggott* v. *Western* (1), which has stood now for so many years.

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(1) 12 Q. B. D. 287.

With regard to the question as to service out of the jurisdiction, I am clearly of opinion that this case does not come within Order XI., r. 1 (*e*). What it is really sought to do in the proposed action is to enforce the charging order against the shares, and no personal judgment against the defendant would be of any use. Order XI., r. 1 (*b*), is limited to lands and hereditaments situate within the jurisdiction. For reasons which the framers of the rules doubtless deemed adequate, no power is given by the rules to serve a writ out of the jurisdiction in an action to enforce a charge against personal property in this country.

Appeals dismissed.

Solicitors for plaintiff: *Pakeman & Read.*

E. L.

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(1) 12 Q. B. D. 287.

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1903
Feb. 20.

[IN THE COURT OF APPEAL.]

SMITH *v.* GOLD COAST AND ASHANTI EXPLORERS, LIMITED.

Frauds, Statute of, s. 4—Contract not to be performed within a Year—Employment for a Year.

Appeal from the order of a Divisional Court (Lord Alverstone C.J., Wills J., and Channell J.) (1) directing a new trial.

A. T. Lawrence, K.C., and *Herbert-Smith*, for the defendants, did not argue that, upon the view taken by the Divisional Court of the facts, their decision was wrong in point of law. They contended that, if there was any evidence of a contract by the defendants, it was of a contract to employ the plaintiff for a year beginning on December 8, 1901, and, the contract alleged by the plaintiff being one made on December 6, the case would then clearly be within the 4th section of the Statute of Frauds.

The Plaintiff in person.

The Court (Vaughan Williams L.J., Stirling L.J., and Mathew L.J.) were of opinion that there was evidence for the jury of a contract to employ the plaintiff for a year beginning from the date of the contract, and consequently there must be a new trial. They therefore affirmed the judgment of the Court below.

Appeal dismissed.

Solicitor for defendants: *H. R. Newson.*

(1) Ante, p. 285.

E. L.

ISAACSON AND ANOTHER *v.* NEW GRAND (CLAPHAM JUNCTION), LIMITED.

1903
Jan. 13, 14.

County Court—Practice—Employer and Workman—Dismissal of Action under Employers' Liability Act, 1880*—Application for Compensation under Workmen's Compensation Act,* 1897*—Right of Appeal from Dismissal of Action—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-ss.* 2, 4.

Where, upon the dismissal of an action under the Employers' Liability Act, 1880, an application is made under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, for an assessment of compensation under that Act, the making of that application does not amount to the exercise of an option on the part of the plaintiff so as to estop him from appealing against the dismissal of the action under the Employers' Liability Act, and the plaintiff is entitled to appeal against both decisions.

Edwards v. *Godfrey*, [1899] 2 Q. B. 333, considered.

Appeal from a decision of the judge of the Westminster County Court.

The action was brought under the Employers' Liability Act, 1880, and the Fatal Accidents Act, 1846, by the plaintiffs as persons entitled to damages in consequence of the death of one Isaacson, who had met with a fatal accident while in the employment of the defendants as an electric engineer at a theatre of which they were the owners. It was tried in the first instance before the deputy judge, who held that the deceased man was not a workman within the meaning of the Employers' Liability Act, and dismissed the action. An application was thereupon, in accordance with the procedure laid down by the Court of Appeal in *Edwards* v. *Godfrey* (1), at once made to the deputy judge on behalf of the plaintiffs to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897; the application was heard, and dismissed by the deputy judge on the ground that the premises on which the accident happened were not a factory, and that the employment of the deceased was therefore not within that Act. The plaintiffs thereupon gave a notice of appeal to the Divisional Court against the dismissal of the action under the Employers'

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(1) [1899] 2 Q. B. 333.

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Liability Act, and a further notice of appeal to the Court of Appeal against the dismissal of the application for compensation under the Workmen's Compensation Act. Upon the hearing of the former appeal by the Divisional Court a new trial was ordered, and upon the application of the plaintiffs the Court of Appeal ordered that the hearing of the appeal under the Workmen's Compensation Act should stand over until after the new trial. Upon the new trial coming on to be heard, the learned county court judge held that there was no evidence of negligence on the part of the defendants to go to the jury, and dismissed the action. An application was then made pro formâ to the county court judge for the assessment of compensation under the Workmen's Compensation Act, and adjourned. The plaintiffs then gave notice of appeal and for a new trial on the ground that there was evidence of negligence which ought to have been left to the jury; and the defendants gave notice of a cross-appeal on the ground that the action was not maintainable by reason of the provisions of the Workmen's Compensation Act, 1897. (1)

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(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 1, sub-s. 1, certain employers are made liable to pay compensation to their workmen for injuries arising out of and in the course of their employment.

By s. 1, sub-s. 2, "Provided that . . . . (*b*) when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

By s. 1, sub-s. 4, "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act."

Moyses, for the plaintiffs. There was evidence of negligence which should have been left to the jury.

[He was stopped by the Court.]

S. T. Evans, K.C. (*Minton-Senhouse* with him), for the defendants. There was no evidence of negligence; the facts were consistent with a pure accident.

[They cited on this point *Willetts* v. *Watt* (1); *Brown* v. *Accrington Cotton Spinning Co.* (2)]

Secondly. The appeal is misconceived. The plaintiffs, by applying at the first trial under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, for compensation to be assessed under that Act, exercised the option given them by that Act, and cannot be allowed to go back upon that option. The general scheme of the Act as shewn in s. 1, sub-s. 2, is that a plaintiff may either take proceedings under that Act or may bring an action independently of the Act, but he cannot do both; when he has once exercised that option his rights under that subsection are exhausted. But s. 1, sub-s. 4, gives him the further right, where he fails in an action brought independently of the Act, but would have been entitled to compensation if he had proceeded under the Act, to make an application to the county court judge to assess such compensation; when he has exercised that further option he cannot fall back again upon the provisions of the Employers' Liability Act.

[They cited *Edwards* v. *Godfrey* (3); *Hoddinott* v. *Newton, Chambers & Co.* (4)]

Lord Alverstone C.J. I greatly regret the necessity for the decision which we feel compelled to give in the present case, and hope that the parties may see their way to agreeing to an assessment of compensation under the Workmen's Compensation Act; we must, however, deal with the case as it stands. At the first trial the deputy county court judge held that the deceased man was not in such a position to his employers, the defendants, as to be entitled to sue under the Employers' Liability Act; but on appeal that decision was

(1) [1892] 2 Q. B. 92.

(2) (1865) 34 L. J. (Ex.) 208.

(3) [1899] 2 Q. B. 333.

(4) [1901] A. C. 49.

overruled in this Court and a new trial ordered, and that point finally disappeared. At the second trial the county court judge held that the defendants had been guilty of no negligence, and against that ruling the present appeal is brought. I am clearly of opinion that there was evidence of negligence which ought to have been submitted to the jury, and that the county court judge was wrong in withdrawing the case from them.

If the case stood there, we should of course be bound to order a new trial. But it is said on behalf of the defendants that there should be no new trial, because after the first trial the plaintiffs exercised an option by making an application to the learned deputy judge to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act. It seems to me that the rule laid down by the Court of Appeal in *Edwards* v. *Godfrey* (1) places a plaintiff to a certain extent in a difficulty. Under that decision a plaintiff who fails in an action under the Employers' Liability Act must then and there make an application to the county court judge if he desires compensation to be assessed under s. 1, sub-s. 4, of the Workmen's Compensation Act; but in order that it may be open to him to do so he must proceed upon the basis that it has been "determined in the action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act." Whatever may be the real meaning of the second provision, the condition which allows the plaintiff to exercise the option is that the defendant is not liable in the action under the Employers' Liability Act. The plaintiff is then in the position that he must preserve his rights: if he does not appeal, he desires to get compensation under s. 1, sub-s. 4; if he appeals, and appeals successfully, the action will not have really been decided at that stage, that is, by the county court judge. The proper view is, in my opinion, that if the plaintiff intends to appeal he may at that stage have to make an application pro formâ to the county court judge to assess the compensation under the Workmen's Compensation Act, and ask that the application may stand over until the appeal has been heard.

(1) [1899] 2 Q. B. 333.

It cannot be that because the county court judge has wrongly determined the action in favour of the defendants the plaintiffs are debarred from taking any further proceedings, and we ought not to decide that we are powerless because the plaintiffs took this step before the county court judge with a view to the protection of their rights. Unless the view which I have expressed is correct, we ought not to have ordered a new trial on the first occasion, if all the facts had been brought before us.

WILLS J. I am entirely of the same opinion. There was clearly evidence of negligence, and the case ought not to have been withdrawn from the jury. As to the other point, it becomes perfectly clear when the facts are once understood. The sole condition under which the jurisdiction to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act arises is that the action brought independently of that Act must have been dismissed; if the decision of the county court judge dismissing the action is held on appeal to be wrong, the action has not in any proper sense of the word been dismissed. It does not matter, to my mind, to what extent the proceedings are carried, if the final result of them is that the original action is not dismissed. It cannot be that by reason of the erroneous decision of the judge in the county court a plaintiff is to be compelled to accept a smaller sum by way of compensation or damages than he would have been entitled to if the judge had given a correct decision at the trial.

CHANNELL J. concurred.

Appeal allowed. New trial ordered.

Solicitors for plaintiffs: *C. T. Nicholls.*
Solicitors for defendants: *Wynne-Baxter & Keeble.*

W. J. B.

1903
Jan. 28.

STILES *v.* ECCLESTONE.

County Court—Jurisdiction—Claim for Injunction only—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 56—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89.

An action, in which an injunction only is claimed, is within the jurisdiction of a county court, provided that the case is one in which, if there had been a claim for damages, the claim must have been for an amount within the jurisdiction of a county court.

Appeal of the defendant from the county court of Suffolk holden at Mildenhall.

The plaintiff claimed a perpetual injunction to restrain the defendant, a married woman, from committing a breach of an agreement contained in the following document, signed by the defendant before marriage and addressed to the plaintiff: "In consideration of your having taken me into your employment as dressmaker I, the undersigned Annie Frear, hereby undertake and agree with you and your successors in business that after quitting your employment I will not at any time carry on, manage or conduct, or be in any manner either directly or indirectly concerned in the carrying on, management, or conduct of the business or occupation of a dressmaker or any similar business or occupation within ten miles of the town of Mildenhall aforesaid under a penalty of forty pounds, to be recoverable by you or your successors in business as and for liquidated damages."

The plaintiff did not claim damages.

For the defence it was contended, inter alia, that the county court judge had no jurisdiction to hear the case, an injunction only being claimed. The judge held that he had jurisdiction, and, having found as a fact that a breach of the agreement had been committed, granted an injunction as claimed.

The defendant appealed.

M. Macnaghten, for the defendant. The county court judge wrongly held that he had jurisdiction to try this action. The ordinary jurisdiction of county courts is by s. 56 of the County Courts Act, 1888, confined to "personal actions where the debt, demand, or damage claimed is not more than fifty pounds." The Act of 1888 does not in terms confer upon county court judges power to grant injunctions. That power is derived from s. 89 of the Judicature Act, 1873; but that section only gives jurisdiction to a county court to grant relief by means of an injunction "in all causes of action within its jurisdiction." The present case is not within the county court jurisdiction, because, no damages at all being claimed, it is clearly not a personal action in which the damage claimed does not exceed 50*l*. Even if a claim for damages had been added, the action must have failed, because a plaintiff is not entitled in a case like this to claim both an injunction and damages: *General Accident Assurance Corporation* v. *Noel* (1); *Carnes* v. *Nesbitt*. (2) The result of upholding the decision appealed from will be to confer an unlimited jurisdiction upon county court judges in cases where an injunction only is claimed. This question was referred to, but not decided, in *Martin* v. *Bannister*. (3)

A. M. Talbot (*A. H. Poyser* with him), for the plaintiff, was not called upon.

LORD ALVERSTONE C.J. If it had been shewn in this case that there was no jurisdiction in the county court to entertain any claim for a breach of this agreement, the point made on behalf of the defendant, that there was no jurisdiction to grant an injunction, would have been good. If parties have so bound themselves by a contract that in the event of a breach the remedy by way of damages must of necessity be by a claim for an amount in excess of the county court jurisdiction, then the case cannot be brought within the jurisdiction of the county court merely because an injunction only is claimed. But if the terms of an agreement are such that a claim for

(1) [1902] 1 K. B. 377.

(2) (1862) 7 H. & N. 778.

(3) (1879) 4 Q. B. D. 212, 491.

damages for a breach is one which could be brought in the county court, then the case of *Martin* v. *Bannister* (1) is clear authority that an injunction also may be granted in the county court. In the present case the sum which might be claimed as liquidated damages for a breach of this agreement has been fixed by the parties themselves at an amount within the limit of the county court jurisdiction; and the county court had therefore, in my opinion, jurisdiction to entertain a claim for an injunction, the remedy by injunction being alternative to the remedy by way of liquidated damages. It was contended that an injunction and damages cannot both be claimed in these cases. That is not so. The authorities to which we have been referred only decide that a plaintiff cannot claim both an injunction and the sum fixed upon as liquidated damages; but there is no reason why a plaintiff should not claim the actual damages suffered through a breach of the agreement in the past, and also an injunction to restrain future breaches.

In my opinion the decision of the county court judge was right, and the appeal will therefore be dismissed.

WILLS J. I am of the same opinion. When one considers that the County Courts Act, 1888, was passed long after the Act which first gave to county courts all the remedies within its jurisdiction that the High Court has, it is impossible to say that it was intended to exclude cases where an injunction only is asked for. In cases in which, if damages had been claimed, the amount must be less than 50*l.*, I think a county court has jurisdiction to entertain a claim for an injunction only.

CHANNELL J. I agree. This is obviously a personal action, and it is also one in which there is no claim for a debt, demand, or damage exceeding 50*l.* I do not mean to say that all personal actions in which there is no claim for damages can be brought in the county court; but where the case is one in which the parties have by the terms of the contract assessed the amount

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(1) 4 Q. B. D. 212, 491.

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of the damages at less than 50*l.*, it is clear that the county court has jurisdiction, although no damages are in fact claimed.

Wills J. I wish to add that I entirely accept the limitation expressed by my brother Channell.

Appeal dismissed.

Solicitors for plaintiff: *Edgar Robins & Clark, for Salmon & Son, Bury St. Edmunds.*

Solicitors for defendant: *Bridges, Sawtell & Co., for Bendall & Sons, Newmarket.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.

1903

Feb. 20.

BOZSON *v.* ALTRINCHAM URBAN DISTRICT COUNCIL.

Practice—Appeal—Order whether Final or Interlocutory—Order to try Preliminary Question of Liability—Action dismissed.

An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the plaintiff appealed:—

Held, that the appeal was from a final order.

Shubrook v. *Tufnell*, (1882) 9 Q. B. D. 621, followed.

Appeal by the plaintiff from an order of Wills J.

The action was brought to recover damages for breach of contract. An order in the following terms was made in chambers: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to official referee." The case came on before Wills J. at Manchester on March 6, 1902. The learned judge held that there was no binding contract between the parties, and made an order dismissing the action, upon which order judgment was subsequently

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entered for the defendants. The plaintiff appealed from the order of Wills J. Notice of appeal was given on May 3, 1902.

Pickford, K.C. (*Langton* with him), for the defendants. There is a preliminary objection to the hearing of this appeal. It is an appeal from an interlocutory order, and the appeal is therefore out of time. The test for ascertaining whether an order is final or interlocutory, as laid down by the Court of Appeal in *Salaman* v. *Warner* (1), is that an order is not a final order unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. In the present case the decision of Wills J. as given did in fact put an end to the litigation; but it would have been otherwise if the decision had been in favour of the plaintiff, because then the case would have had to go before the official referee. The order of Wills J. was therefore, according to the rule enunciated in *Salaman* v. *Warner* (1), an interlocutory order. The principle of that case was affirmed in *In re Herbert Reeves & Co.* (2); but there is an earlier decision of the Court of Appeal, *Shubrook* v. *Tufnell* (3), which was not cited in *Salaman* v. *Warner* (1), and which appears to be in conflict with it.

Montague Lush, K.C., and *M. Macnaghten*, for the plaintiff, were not called upon.

THE EARL OF HALSBURY L.C. The learned counsel for the defendants has very properly called our attention to the fact that the authorities on this point are not in harmony. I prefer to follow the earlier decision. I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time.

LORD ALVERSTONE C.J. I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as

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(1) [1891] 1 Q. B. 734.

(2) [1902] 1 Ch. 29.

(3) 9 Q. B. D. 621.

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a final order; but if it does not, it is then, in my opinion, an interlocutory order.

Sir F. H. Jeune P. concurred.

Objection overruled.

Solicitor for plaintiff: *C. J. Fowler, for Grundy, Lamb & Grundy, Manchester.*

Solicitors for defendants: *Nicholls, Harris & Lindsell, Manchester.*

F. O. R.

BANKES *v.* JARVIS.

1903
Jan. 28.

Practice—Plaintiff suing as Trustee—Unliquidated Damages due to Defendant from Cestui que Trust—Equitable Defence—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 2, 3—*Order* XIX., *r.* 3.

In an action to recover a debt due to the plaintiff as a trustee, the defendant is entitled to set up as a defence that the cestui que trust is indebted to him in a sum for unliquidated damages exceeding the amount of the claim.

Appeal from the county court of Sussex holden at Hastings.

The facts were as follows. In 1895 Vernon Bankes, the plaintiff's son, bought from the defendant a veterinary surgeon's practice at Battle. The defendant was lessee of a house used in connection with the practice, and by an indenture of assignment indorsed on the lease at the time of the sale the defendant assigned the lease to Vernon Bankes, who thereby covenanted to pay the rent and to observe and perform all the covenants in the lease, and to keep the defendant indemnified from and against all claims and demands for or on account thereof.

Vernon Bankes carried on the practice until 1901, when he went to New Zealand. Before leaving he gave to the plaintiff, his mother, authority in writing to sell the veterinary surgeon's practice. In May, 1901, the plaintiff entered into an agreement with the defendant by which, after reciting the written authority to sell given by her son, she agreed to sell the goodwill of the practice, together with the fixtures, fittings, instruments, and stock, to the defendant for 100*l.*, payment to be in two instalments of 50*l.*

The plaintiff claimed in the action 50*l.*, being the second instalment due under the agreement.

The claim was not disputed, but the defendant counterclaimed 51*l.* as damages for breach by Vernon Bankes of his covenant to indemnify the defendant, being 21*l.* for rent which the defendant had been compelled to pay through the default of Vernon Bankes, and 30*l.* paid by the defendant in settlement of a claim for damages for breach by Vernon Bankes of the covenant to repair.

It was admitted that the amount counterclaimed was fair and reasonable, and that if the action had been brought by the son the defendant would have had a good counterclaim against him. The county court judge gave judgment for the plaintiff on the claim, but found as a fact that the practice had not been assigned to her, and that she only recovered as trustee for her son. With regard to the counterclaim the judge held that, though the defendant could have set off an ordinary debt or demand due from the son against the debt payable by the defendant to the plaintiff, suing as trustee for her son, the defendant could not counterclaim against the plaintiff for unliquidated damages.

The defendant appealed.

Thorn Drury, for the defendant. The county court judge has held that the plaintiff is suing as trustee for her son. The defendant is, therefore, entitled to rely on any defence which would be a good defence to an action by the son. A defendant may now under the Judicature Act, 1873, s. 24, sub-ss. 2 and 3, Order XIX., r. 3, set up a counterclaim for unliquidated damages as a defence to the extent of the claim: *Macdonald* v. *Bode* (1); *Mersey Steamship Co.* v. *Shuttleworth* (2); *Westacott* v. *Bevan* (3); *Amon* v. *Bobbett* (4); *Young* v. *Kitchin* (5); *Stumore* v. *Campbell*. (6) Judgment ought, therefore, to have been entered for the defendant. The plaintiff suing as her

(1) W. N. (1876) 23.
(2) (1883) 11 Q. B. D. 531.
(3) [1891] 1 Q. B. 774.
(4) (1889) 22 Q. B. D. 543.
(5) (1878) 3 Ex. D. 127.
(6) [1892] 1 Q. B. 314.

son's agent cannot be in a better position than she would have been if she had sued as assignee, and in that case this counterclaim would have been a good equitable defence to the action.

E. E. Humphreys, for the plaintiff. This counterclaim is entirely misconceived. Sect. 24, sub-s. 3, of the Judicature Act, 1873, confines counterclaims to cases where the defendant's claim is against the person suing. The section then goes on to provide for bringing in third persons. The proper course for the defendant to pursue was to join the plaintiff's son as a third party. Otherwise the result is that judgment is, in effect, obtained against the son without his being heard.

[CHANNELL J. If the defendant's counterclaim had been for a liquidated amount there can be no question but that it would have been a good answer to the plaintiff's action; but the same difficulty as to the son's absence would have arisen.]

The utmost that the defendant can ask for is that execution on the judgment should be stayed until his action against the son has been tried. A counterclaim can only be brought against a plaintiff in the same capacity as that in which the plaintiff is suing: *Macdonald* v. *Carington*. (1) Here the plaintiff is suing as trustee, but the counterclaim is against her as principal. [He referred to *Furness* v. *Booth*. (2)]

LORD ALVERSTONE C.J On the facts as found by the county court judge in this case, it is quite clear, indeed it is not disputed, that 51*l*. was due to the defendant from the plaintiff's son as damages for breach of the covenant to indemnify the defendant, and if the son had been plaintiff in the action instead of the mother, the defendant would have had a good counterclaim against the son for that sum. The action was, however, brought by the mother as agent or trustee for her son, and the case, therefore, raises the simple question whether the defendant can set up as a defence the claim for unliquidated damages which he has against the son in the same way as he could have set off a debt due from the son if it had been a liquidated amount. In my opinion the case is covered by the sections of the Judicature Act and the

(1) (1878) 4 C. P. D. 28.

(2) (1876) 4 Ch. D. 586.

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rule which have been referred to. I think that it was intended by s. 24, sub-ss. 2 and 3, of the Judicature Act to give to a defendant the right to set up a defence, such as is relied on here, in the same way as he might have raised an equitable defence before the Judicature Act. If grounds exist which formerly would have entitled a defendant to file a bill in Chancery to restrain the plaintiff from proceeding with his action, I think a defendant is now enabled to rely on those grounds as a defence to the action. If in the present case there had been a claim by the defendant to set off a liquidated sum of 50*l.* due to him from the son, the defendant would clearly have been entitled to rely on that set-off as a defence to the action, and the cases of *Jeffs* v. *Day* (1) and *Agra and Masterman's Bank* v. *Leighton* (2) are, in my opinion, distinct authorities for the proposition that where an action is brought by a plaintiff as trustee for a third person, and by reason of the defendant having a claim against that third person it would be wrong and inequitable for the plaintiff to recover judgment on behalf of that third person, the defendant is entitled to set up his claim as an equitable defence to the action. A plaintiff suing as trustee cannot be in a better position than an assignee for value suing in his own name, against whom all equitable defences can be relied on. I think that as the defendant in this case had a good claim against the plaintiff's son he was entitled to rely on that as an equitable defence to the extent of the plaintiff's claim. This principle is one which has long been acted on, though it may be that there is no decision directly in point. The appeal must be allowed.

WILLS J. I am of the same opinion. I confess I have some difficulty in seeing how the plaintiff was entitled to sue at all in this case. She had no personal right to the subject-matter of the action, and, therefore, it is difficult to apply the analogy of an assignee for value who has a personal right to sue. I think that this point might possibly have been taken as an answer to the action, but I do not express a definite opinion upon it because it has not been argued and it is not necessary

(1) (1866) L. R. 1 Q. B. 372.

(2) (1866) L. R. 2 Ex. 56.

to do so. We have to decide this case on the assumption that the plaintiff was entitled to sue in her own name as trustee on behalf of her son. Now, I am unable to understand how a person, by creating a trustee to sue for him, can be entitled to any greater rights than he would be if he sued in his own name. It seems to me, putting it on the broadest possible principle, that, if the plaintiff sues as trustee for her son, she can only do so subject to all defences which would be available against him; and if the son had been suing, both liquidated and unliquidated claims might have been relied on by the defendant as an answer to the action. In my opinion there is no ground, either in justice or in law, which can lead to the unreasonable result that the same defences cannot be set up against the plaintiff suing as trustee for her son as would be available if the son himself were plaintiff.

CHANNELL J. I think that this counterclaim ought to have been allowed as a set-off—that is to say, it is a good defence to the extent of the plaintiff's claim; it could not, of course, stand as a counterclaim for the full amount. The case of *Agra and Masterman's Bank* v. *Leighton* (1) is clear authority that before the Judicature Act a liquidated amount owing to the defendant by the plaintiff's son could have been set off by the defendant against the claim of the plaintiff suing as trustee for her son. Then the Judicature Act, and more especially the rules, distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off; and consequently the defendant's claim against the plaintiff's son, which, if liquidated, could have been pleaded before the Judicature Act as a set-off to the plaintiff's claim, can now, although unliquidated, be relied on as a defence to the extent of the claim.

Appeal allowed. Leave to appeal.

Solicitors for plaintiff: *Kingsford, Dorman & Co., for Cruttenden, Hastings.*

Solicitors for defendant: *Attree, Johnson & Ward, for Sheppard, Battle.*

F. O. R.

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(1) L. R. 2 Ex. 56.

C. A.

1903
Feb. 26.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF THE RURAL DISTRICT COUNCIL OF GODSTONE AND THE URBAN DISTRICT COUNCIL OF CATERHAM.

Local Government—Creation of Urban District—Subtraction of Parish from Rural District—Highway Expenses—Loss of Income—Matter requiring Adjustment—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62 —*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 54.

Where, by order of a county council under s. 57 of the Local Government Act, 1888, a parish, which had previously formed part of a rural district, was separated from that district and constituted an urban district, and the contributions of that parish to the highway expenses of the rural district had exceeded the expense of the repair of the highways in the parish :—

Held, that the loss of income occasioned to the rural district council by the subtraction of that parish from their district constituted a matter requiring adjustment under s. 62 of the Local Government Act, 1888.

In re Rochdale Union and Haslingden Union, [1899] 1 Q. B. 540, followed.

APPEAL from the judgment of Wright J. upon an award in the form of a special case stated by an arbitrator appointed by the rural district council of Godstone and the urban district council of Caterham to determine a question which had arisen between them with regard to the claim of the former to have a certain matter adjusted between the two councils under s. 62 of the Local Government Act, 1888.

The facts stated in the case were in substance as follows. In the year 1864 the Godstone highway district was formed under the provisions of the Highway Act, 1862. The district so formed included, among other parishes forming the Godstone Union, the parish of Caterham. In the year 1894, by virtue of the provisions of the Local Government Act, 1894, the rural district council of Godstone became the successors of the rural sanitary authority of Godstone, and of the Godstone District Highway Board; and the Godstone District Highway Board ceased to exist, and all the powers, duties, and liabilities of the rural sanitary authority of Godstone and of the Godstone

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District Highway Board were transferred to the rural district council of Godstone.

By an order made on October 18, 1898, by the county council of Surrey, in pursuance of the Local Government Acts, 1888 and 1894, and confirmed on February 16, 1899, with certain modifications by the Local Government Board, the parish of Caterham ceased to form part of the rural district of Godstone, and was converted into and constituted an urban district with the name of the urban district of Caterham. By art. 8 of the order as modified by the Local Government Board it was provided as follows: "On and after the day of the first meeting of the urban district council of Caterham all the property and liabilities which are attaching to, or vested in, the Godstone Rural District Council shall, so far as regards the area comprised in the said urban district of Caterham, pass to and vest in the said urban district council; but until such day the powers, duties, liabilities, and property of the said rural district council shall continue to be exercisable by, attached to, and vested in the said rural district council. For the purpose of any adjustment under the Local Government Acts any balance standing on the date when this order comes into operation in the general expenses account of the rural district council of Godstone in favour of the said parish of Caterham shall be deemed to be the property of the overseers of such parish, and any balance standing at the same time in the said account against the said parish shall be deemed to be a liability of the overseers of the said parish, and for the said purpose any balance standing on the said date in the special expenses account of the said parish in the accounts of the said rural district council in favour of or against such parish shall be deemed to be a property or a liability, as the case may be, of the Caterham Urban District Council. Any sum required to be paid by any authority affected by this order in pursuance of any agreement or of any award made under the said Acts, may be paid out of such fund as shall be determined by the agreement or by the award. In default of an agreement being made under the said Acts as to any matters requiring adjustment by reason of a doubt as to the parties who should enter

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into such agreement, or for any other reason, the matter shall be referred to the county council, who shall make such order therein as may seem to such council to be equitable."

By virtue of the terms of the order, since April 17, 1899, the highways of the parish of Caterham had been under the separate control and management of the Caterham Urban District Council, and the parish of Caterham had ceased to contribute towards the highway expenses of the rural district council of Godstone.

The rural district council of Godstone proposed before the arbitrator to prove that during the three years preceding April 1, 1899, and while the parish of Caterham was part of the rural district of Godstone, the Godstone Rural District Council received from rates levied in the parish of Caterham for highway purposes a sum considerably greater than that expended during the same period by them in respect of the maintenance and repair of highways in that parish. They tendered in evidence before the arbitrator a document which was to be taken to be part of the case, and which shewed an average amount of something like 600*l.* per half-year by which the receipts from Caterham had exceeded expenditure in respect of Caterham. They claimed against the Caterham Urban District Council for that their income, liabilities, and expenses in respect of the maintenance and repair of highways were affected by the before-mentioned order by reason of loss of contributions from the parish of Caterham to the maintenance and repair of highways in the Godstone rural district, that is to say, that the contributions which had been withdrawn from the Godstone Rural District Council in consequence of the order exceeded what it cost the council to maintain the highways in the parish of Caterham in proper repair, and by reason of the increase in the rates for the maintenance and repair of highways in the Godstone rural district in consequence of having lost the contributions from the parish of Caterham by the operation of the order; and the Godstone Rural District Council alleged that they were entitled to have their said claim adjusted by arbitration under the provisions of s. 62 of the Local Government Act, 1888. The Caterham Urban District

Council alleged that in respect of the said claim there was no matter requiring adjustment under the provisions of the said section. The arbitrator decided that the claim was a matter requiring adjustment under the provisions of s. 62 of the Local Government Act, 1888, but stated his award in the form of a special case for the opinion of the Court on the question whether his decision was correct.

Wright J. gave judgment for the Godstone Rural District Council on the authority of *In re Rochdale Union and Haslingden Union.* (1)

R. M. Bray, K.C., and *Montague Shearman*, for the appellants, the Caterham Urban District Council. There is no matter in this case requiring adjustment by an arbitrator between the Godstone Rural District Council and the Caterham Urban District Council. By the law as it stood prior to the Local Government Act, 1888, a parish which formed part of a highway district could be subtracted from it by an order of justices under s. 39 of the Highway Act, 1862, or by the constitution of it into an urban sanitary district under the Public Health Act, 1875, without the possibility of any such claim for compensation as that in the present case being made by the remainder of the district from which it was subtracted. The respondents' contention indirectly contravenes the 145th section of the Public Health Act, 1875, which provides that the inhabitants of an urban district shall not be liable for the repair of highways outside their district. There is no reason why the Local Government Act, 1888, should have made any change in this respect. There is no vested right in the remainder of the district to have the benefit of the excess of the contributions made by the separated parish over the expenditure in respect of that parish. The power of ordering a parish to be subtracted from the highway district was doubtless given to meet cases in which circumstances might render it inequitable that it should any longer continue part of the district, and one such circumstance might be that the amount of its contributions greatly exceeded the amount necessary for the repair of its roads. According to the argument for the respondents, in such a case the very object of the separation may be neutralized by an adjustment such as is claimed. Sect. 57 of the Local Government Act, 1888, is the section under which the order constituting Caterham an urban district was made. By s. 59, sub-s. 1, it is provided that a scheme or order under the Act may make such administrative and judicial arrangements incidental to or consequential on any alteration of boundaries or authorities as may seem expedient, and by sub-s. 4 (*e*) of the section it is provided that such a scheme or order may adjust any property, debts, and liabilities affected by the scheme or order. The matter put forward by the respondents as a matter for adjustment does not come within the words "property, debts, and liabilities." Then by s. 62, sub-s. 1, it is provided that authorities affected by any scheme or order made in pursuance of the Act may make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by the scheme or order, of the parties to the agreement; and by sub-s. 2 of the same section, it is provided that, in default of an agreement as to any matter requiring adjustment for the purpose of the Act, or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by the Act, such adjustment or difference may be made or determined by an arbitrator to be appointed by the parties, or, in case of difference as to the appointment, appointed by the Local Government Board. The matter here in question is not a matter requiring adjustment for the purpose of the Act. The order of the county council, as modified by the Local Government Board, itself by implication disposes of the matter, and shews that it was not intended by the order that there should be any such adjustment as is here claimed. Art. 8 of the order deals expressly with property, debts, and liabilities under s. 59, sub-s. 4 (*e*), of the Act, and says nothing about income or expenses. This case is distinguishable on this ground from *In re Rochdale Union and Haslingden Union* (1), for it appears from the report of that case in the Court below (1) that the order there expressly provided for an adjustment by the arbitrator having regard to the large amount of workhouse accommodation then provided for the Rochdale Union and other special circumstances of that union. The Court of Appeal affirmed the judgment of the Divisional Court in that case. At the end of his judgment in the Divisional Court Channell J. expressed an opinion that such a matter as this was not one which per se required adjustment within the meaning of s. 62, though, where an adjustment in respect of other matters was required, it might form an element to be taken into account in making such adjustment. In the case of *In re Rochdale Union and Haslingden Union* (2) the section applicable was s. 68 of the Act of 1894, which, like s. 62 of the Local Government Act, 1888, provides for the adjustment of (inter alia) income and expenses. It is contended that s. 54 of the Act of 1894 is the section applicable in the present case, and not s. 62 of the Act of 1888. Sect. 54 in terms applies to the case of the constitution of a new urban district, and by sub-s. 1 (*c*) it only provides for the adjustment of property, debts, and liabilities affected by the creation or constitution of the new district. This cannot be said to be a claim for an adjustment of "liabilities," for that word only applies to the apportionment of liability in the case of outstanding contracts or matters of that sort. It has no application to the liabilities to which the new body and the remainder of the old district respectively are by law to be separately liable in future, such as their respective highway expenses. The terms of s. 54, sub-s. 2 (*b*), clearly shew that the section applies to this case. There is no reason founded either on justice or expediency why there should be such an adjustment as is here asked for in a case where the county council presumably think that the circumstances make it equitable that a parish should be separated from a rural district and formed into an urban district responsible for its own highways only. It is not like a case where, by the provisions of the Local Government Act, an

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(1) [1899] 1 Q. B. 540.

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(1) [1899] 1 Q. B. 540.

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(1) [1898] 2 Q. B. 206.

(2) [1899] 1 Q. B. 540.

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alteration of areas is required to be effected compulsorily, merely for the purpose of preventing the overlapping of areas, or assimilating the areas of districts for different purposes, in which case it might be reasonable that there should be some compensation for the loss of a profit such as that which accrued to the Godstone Rural District Council from the parish of Caterham in the present case.

C. A. Russell, K.C., and *G. Humphreys*, for the respondents, the Godstone Rural District Council. The case of *In re Rochdale Union and Haslingden Union* (1) really concludes the present case. It is obvious from what was said by Lord Russell C.J. in giving judgment that the claim in that case was exactly similar to that in the present case. The case of *In re Buckinghamshire County Council and Hertfordshire County Council* (2) is to the same effect. The order of the county council, as modified by the Local Government Board, clearly contemplates that there may be further matters which require adjustment for the purposes of the Act. There is a substantial reason why it may be just that, in such a case, there should be such an adjustment of income and expenses as is here claimed. It may often happen, and it is the case here, that some of the roads in the remainder of the district, from which a new urban district has been carved, are, from the increasingly populous character of that urban district, likely to be more used by the inhabitants of that district than those of the remainder of the rural district.

It is true that some of the words of s. 54 of the Local Government Act, 1894, taken by themselves, would apply to this case; but when the objects of that Act and the context are looked at, it is obvious that what s. 54 is dealing with is merely the adjustments that may become necessary in relation to the new parish councils created by that Act, and property, duties, and liabilities as between them and newly created urban authorities. That section has really nothing to do with the present case, which depends on s. 62 of the Local Government Act, 1888, a section which is in similar terms as regards the present purpose to s. 68 of the Act of 1894, upon which *In re Rochdale Union* v. *Haslingden Union* (1) was decided.

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(1) [1899] 1 Q. B. 540.

(2) [1899] 1 Q. B. 515.

Bray, K.C., in reply.

VAUGHAN WILLIAMS L.J. The question which we have to determine in this case is whether there is, in respect of the claim made by the Godstone Rural District Council, a matter requiring adjustment under the 62nd section of the Local Government Act, 1888. The Godstone Rural District Council contend that, by reason of an order of the county council of Surrey confirmed by an order of the Local Government Board, by which orders the parish of Caterham, which theretofore was a constituent part of the Godstone rural district, was constituted a separate unit, there is a matter which, under the Local Government Act, 1888, ought to be adjusted as between the Godstone Rural District Council and the Caterham Urban District Council. The matter with regard to which the Godstone Rural District Council claim such an adjustment arises in this way. It is alleged that, while the parish of Caterham was part of the Godstone rural district, or of the antecedent highway district, the contributions of the parish of Caterham to the maintenance of the highways of the district exceeded the amount actually expended on the maintenance of the highways in the parish of Caterham, which now have to be maintained by the Caterham Urban District Council; and that the excess of those contributions over that expenditure amounted to a very considerable sum, averaging about 600*l*. per half-year. It is said that, by reason of the separation of the parish of Caterham from the Godstone rural district, the council of that district will lose the profit which they formerly derived from the contributions of the parish of Caterham in the manner which I have mentioned. The question which we have to determine is whether, if the facts are as alleged by the Godstone Rural District Council, they constitute a matter which ought to be adjusted pursuant to the provisions of s. 62 of the Local Government Act, 1888. The learned judge in the Court below came, apparently with some reluctance, to the

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(1) [1899] 1 Q. B. 540.

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conclusion that the loss which the Godstone Rural District Council will sustain by reason of the constitution of the Caterham urban district is a loss of income which ought to form the subject of adjustment within the meaning of the Act of 1888. He felt bound to come to that conclusion by reason of the decision of this Court in the case of *In re Rochdale Union and Haslingden Union.* (1) I agree with Wright J. that that decision does exactly cover the question raised in the present case. That decision is of course binding upon us, and therefore I think that the judgment of the learned judge must be affirmed. But I think it is right that I should say a few words with regard to the grounds upon which it was sought to distinguish the present case from *In re Rochdale Union and Haslingden Union.* (1) The decision in that case and that in the case of *In re Buckinghamshire County Council and Hertfordshire County Council* (2), in the Queen's Bench Division, which is to the same effect, appear to have been based respectively on certain words contained in s. 62 of the Local Government Act, 1888, and s. 68 of the Local Government Act, 1894. It will be seen that those sections differ from some other sections in the Local Government Acts of a similar nature in that they contain the words "income" and "expenses"; and it appears to have been upon those words that it was held in the two cases which I have mentioned that, where a loss of income was occasioned to an authority through the separation of a portion of its district from which it derived a profit by reason of the contributions of that portion exceeding the expenditure in respect of it, that loss of income was a matter which might be the subject of an agreement under s. 62, sub-s. 1, of the Act of 1888, or s. 68, sub-s. 1, of the Act of 1894, as the case might be; or which, in default of such an agreement, might be the subject of an arbitration as provided for by the subsequent part of the sections respectively. It results from the authorities to which I have referred that primâ facie the loss of income which has in this case been sustained by the Godstone Rural District Council, through the operation of the order constituting the parish of Caterham an urban district, is a matter requiring

(1) [1899] 1 Q. B. 540.

(2) [1899] 1 Q. B. 515.

adjustment within the terms of s. 62 of the Local Government Act, 1888, and therefore one which the Godstone Rural District Council and the Caterham Urban District Council might have dealt with by agreement, and which, as they have not done so, is within the jurisdiction of an arbitrator appointed under the section. The grounds upon which it is contended that the matter is not one for adjustment by an arbitrator are as follows. First, it is said that the order made by the county council, who had jurisdiction to deal with such matters under s. 57 of the Local Government Act, 1888, as modified by the order of the Local Government Board, does in fact dispose of this matter; because it deals with the powers, duties, liabilities, and property of the Godstone Rural District Council and the Caterham Urban District Council; and it is said that the proper inference to be drawn is that, as the order did not deal with the question of income, it was not considered that the case called for any adjustment in respect of income, and it was not intended that there should be one. I do not think that such an inference is justified by the terms of the order. It appears to me, upon looking at the words of the order, that, notwithstanding its provisions, it was contemplated that there might still be matters which would require adjustment under s. 62. I do not think it is established that the terms of the order dealt with this matter so as to exclude any subsequent adjustment in respect of income. It was argued that the last clause of art. 8, beginning with the words "in default of agreement," dispose of the question, and exclude any adjustment of income by an arbitrator under s. 62. I cannot agree with that view of its meaning.

I will now deal with the only other substantial ground which was relied upon to shew that s. 62 does not apply to this case. It is argued that, whatever may have been the state of things prior to the passing of the Local Government Act, 1894, which introduced parish councils, now, by reason of the provisions of s. 54 of that Act, the matter which is put forward by the Godstone Rural District Council as a matter of adjustment is outside the jurisdiction of the arbitrator. I confess that, at the conclusion of Mr. Shearman's argument, I was half disposed to take that view; but Mr. Humphreys' argument has convinced me that it is incorrect. The argument for the Caterham Urban District Council is that, whereas s. 62 of the Act of 1888 contains the words "income" and "expenses," the matter here in question is now governed by the provisions of s. 54 of the Act of 1894, and those words are not found in that section, but only the words "property, debts, and liabilities." Sect. 54, sub-s. 1, contains the words, "where a new borough is created, or any other new urban district is constituted," which no doubt, taken by themselves, would apply to the present case. The sub-section by clauses (*a*) and (*b*) provides for matters which relate purely to parish council purposes, and have no bearing whatever on the question whether the adjustment of income is a subject of arbitration; and then by clause (*c*) it is provided that "provision shall also where necessary be made for the adjustment of any property, debts, and liabilities affected by the said creation, constitution, or extension." Then sub-s. 2 provides that the provision aforesaid shall be made, among other cases, "(*b*) where any other new urban district is constituted by an order of the county council under s. 57 of the Local Government Act, 1888." There is no doubt that this case falls within these words, and the argument is that the provisions of s. 54, sub-s. 1 (*c*), are therefore applicable, and the subject-matters of adjustment in this case are limited to those mentioned in that clause. But, if we were to hold that since the Act of 1894, upon the constitution of a new urban district, the matters for adjustment are limited to those mentioned in s. 54, sub-s. 1 (*c*), we should be holding in effect that the provisions of the Act of 1894 were intended to repeal pro tanto the provisions of ss. 57 and 62 of the Act of 1888, so far as regards the adjustment of "income" and "expenses." I do not think that we ought so to read the provisions of the Act of 1894. I think that, as Wright J. pointed out in the Court below, the proper construction of the provisions of s. 54, sub-ss. 1 and 2, of the Act of 1894 is that they only govern matters for which it became necessary to provide upon the creation of parish councils under that Act.

Before concluding I wish to say a word or two with regard to what we are to be taken to decide in this case. Reference has been made to a document, which is to be taken to form part of the special case, and from which it would appear that what the Godstone Rural District Council are claiming is that the Caterham Urban District Council should be ordered to pay them a sum which represents the capitalized value of a half-yearly sum of 600*l*., and which is worked out apparently at about 36,000*l*. I wish to say emphatically that there is nothing in our decision which involves that that is necessarily the proper measure of the amount which can be claimed by the Godstone Rural District Council. The arbitrator, in dealing with the claim, will have to take all relevant matters into consideration. Let us see what he will have to consider. I do not propose to lay down any exact measure for him, but only to point out certain matters which may have to be considered by him as tending to shew that the true measure is not that represented by the capitalization of a half-yearly profit of 600*l*. That measure is based on the assumption that, but for the order constituting Caterham an urban district, things would necessarily have gone on for ever as they existed previously to that order, and that the proportion between the contributions of the parish of Caterham and the expenses of the repair of highways in that parish would have permanently remained unaltered. It also appears to assume that the roads, or some of the roads, in the Godstone district—the liability to repair which still remains imposed upon the Godstone Rural District Council—are roads which will for ever continue more useful to the inhabitants of the urban district of Caterham than to those of any of the other parishes constituting what is left of the original highway district; because, if there should cease to be any such roads in the Godstone district, then the reason suggested why the Caterham urban district should contribute to the district of which it has ceased to be a member would no longer apply. Taking the opposite view, one cannot help seeing that, if, and so far as, the roads, the liability to maintain which remains imposed upon the Godstone Rural District Council, may be roads which are practically useless to the urban district of Caterham, that would be a matter which ought to be taken into consideration in measuring the amount, if any, which ought to be paid by the Caterham Urban District Council on an adjustment of income and expenses. I am considerably impressed with the importance of this last consideration in reference to an argument strongly urged by Mr. C. A. Russell. I was expressing to him some reluctance in coming to the conclusion which he suggested, because I doubted whether it had any basis in natural justice. I pointed out that, where there has been an amalgamation of areas into one district for highway purposes, especially where it took place under such circumstances as would lead to the contemplation that it might not be permanent, and there is subsequently a dissolution of that unit, it is difficult to see any ground of natural justice why a part, which is separated, should continue under any obligation to make up the income of the remainder to the figure at which it stood at the time when the union existed. Primâ facie one would think that in such a case the result of the dissolution should be that the different portions would each revert to its antecedent position. Mr. C. A. Russell, in answer, argued that there might be a foundation of natural justice for the conclusion at which he was asking us to arrive; because, as a matter of fact, since Caterham was a growing place, roads in the Godstone district, the liability to maintain which was now imposed on the Godstone Rural District Council, were more useful to Caterham than to any other member of the highway district. If it is true that that is in any sense a foundation for the argument that there ought to be an adjustment in this case, it must follow that the question how far such a state of things is likely to be permanent, and any considerations which may militate against the truth of the proposition that roads in the Godstone district are of greater use to the Caterham district than to the Godstone district, must be matters to be considered by the arbitrator. I am not saying that in this particular case the arbitrator will necessarily have to give effect to such considerations, except as regards one general matter which I think any arbitrator must necessarily consider in such a case, namely, how far the previously existing proportion between the profit

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derived from the separated parish and the expenses of the highways therein is likely to be permanent. Under these circumstances I must confess that I feel more easy with regard to the results of the conclusion at which we have arrived than if I thought that its necessary result would be that the Caterham Urban District Council would have to pay to the Godstone Rural District Council anything like a sum representing the capitalized value of 600*l.* per half-year. For these reasons I think the appeal must be dismissed.

STIRLING L.J. I am of the same opinion, and I have very little to add. I am unable to differ from the judgment of Wright J., who followed the principles laid down by this Court in the case of *In re Rochdale Union and Haslingden Union.* (1) I am aware that the decision in that case turned upon an order made under s. 36 of the Local Government Act, 1894, and was governed by s. 68 of that Act, whereas we are here dealing with an order made under s. 57 of the Local Government Act, 1888, and a matter which is governed by s. 62 of that Act. It nevertheless appears to me that, if the claim put forward by the Rochdale Union in the case of *In re Rochdale Union and Haslingden Union* (1) was a matter for adjustment under s. 68 of the Local Government Act, 1894, it follows that the claim made by the Godstone Rural District Council in this case is a matter for adjustment under s. 62 of the Local Government Act, 1888. That is all that we are called upon to decide, for the only question upon which the arbitrator has asked our opinion is whether the claim put forward by the Godstone Rural District Council is a matter which requires adjustment under s. 62. I entirely agree with what Vaughan Williams L.J. has said to the effect that we are not to be understood to decide that the proper amount to be awarded by the arbitrator is the capitalized value of a half-yearly sum of 600*l.* or anything like it. The question of amount is entirely for the arbitrator.

MATHEW L.J. I agree with Stirling L.J. that there is little which need be added to the judgment of Vaughan

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Williams L.J. It was contended for the appellants that an adjustment by arbitration could not have been intended, because of the difficulty of arriving at any satisfactory conclusion. It was pointed out that no directions were given to the arbitrator as to the course which he should pursue, and as to the grounds upon which he was to make his award. It was asked if it could have been intended that he should capitalize the savings on the assumption that the existing state of things would be permanent. I desire to guard myself against being supposed to sanction any such calculation. The arbitrator will no doubt closely scrutinize any figures laid before him, and consider the changes that may take place in the future. For instance, he may see that a district rural in character at present may in the near future tend to become urban; again, that hereafter the extent of the user of the roads in Caterham may possibly be increased, and involve additional expense. I should be slow to come to the conclusion that the claim as formulated by the Godstone Rural District Council for 36,000*l.* was reasonable or equitable.

Appeal dismissed.

Solicitor for the appellants: *F. B. Winter.*

Solicitors for the respondents: *Cooper, Turner & Evans, for E. A. Head, East Grinstead.*

E. L.

In re AN ARBITRATION BETWEEN CHANDLER'S WILTSHIRE BREWERY COMPANY, LIMITED AND THE LONDON COUNTY COUNCIL.

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Housing of the Working Classes—Lands compulsorily taken—Compensation—Tied House—Covenant running with Land—Fair Market Value—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *s.* 21.

In estimating, under s. 21 of the Housing of the Working Classes Act, 1890, the compensation payable in respect of the interest of the lessors in a house let as a public-house and taken compulsorily for the purposes of the Act, a covenant tying the house must be taken into consideration.

AWARD stated by an arbitrator in the form of a special case.

Chandler's Wiltshire Brewery Company were the assignees of a lease dated January 30, 1889, by which certain premises known as the Horse and Jockey, No. 2, Middle Row, St. Luke's, in the county of London, were demised for the term of thirty years from December 25, 1888, at the yearly rent of 47*l.*, subject to the covenants therein contained, which covenants, in addition to the usual covenants for keeping and surrendering the premises in good repair, comprised a covenant to use the premises as a beerhouse and for no other trade.

By an underlease dated March 24, 1897, the company, in consideration of the sum of 800*l.* paid to them by Thomas Sorrell, demised the premises to Sorrell for the term of twenty-two years, less ten days, from December 25, 1896, at the following rents: Firstly, a yearly rent of 47*l.*; secondly, such sums as the lessors might expend in maintaining the insurance of the premises against damage by fire; and, thirdly, the sum of 200*l.* in any and every year in which the lessee, his executors, administrators and assigns, should, contrary to the covenant thereinafter contained, directly or indirectly deal with any person or persons other than the lessors or their successors in business for any porter, stout, ale, beer or other malt liquors which should be sold or disposed of or consumed in or upon the premises. The lease contained covenants similar to those contained

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in the lease of January 30, 1889, and also "that the lessee, his executors, administrators and assigns, will during the term hereby granted deal exclusively with the lessors . . . . or their successors in business . . . . for all porter, stout, ale, beer and other malt liquors which shall be sold or disposed of or consumed upon the said premises, or shall be brought thereon to be so sold or disposed of or consumed, and will not upon any pretence whatever take in or receive or have in his or their possession, or directly or indirectly sell or dispose or permit the sale, disposal or consumption in or upon the said premises of, any such articles other than such as shall have been purchased or taken of the lessors or . . . . their successors in business . . . . provided they shall be willing to supply the same at a fair price."

The premises having been required by the London County Council under a scheme for improvement in pursuance of the Housing of the Working Classes Act, 1890, an arbitrator was appointed to assess the amount of compensation to be paid.

The company contended that they were entitled to the fair market value of their interest in the premises, having regard to the existence of the covenant and to the profit which they might properly anticipate that they would make from the existence of the premises as a tied house during the continuance of the term. The county council contended that the company were only entitled to compensation for the loss of their interest in the land. The arbitrator determined that, if the company were entitled to be compensated in respect of the damages sustained by them by reason of the determination of the covenant, then the amount to be paid to them was the sum of 653*l.*; but if they were not so entitled, then the amount to be paid was the sum of 10*s.* (1)

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(1) By s. 21 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), "Whenever the compensation payable in respect of any lands or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of this Act requires to be assessed . . . . the estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made of such lands, and of the several interests in such lands. . . ."

Bray, K.C. (*Kisch* with him), for the brewery company. The question is, What is the fair market value of the interest of the company in the premises? To estimate that it is necessary to take into consideration the covenant tying the house. That is a covenant which runs with the land: *Clegg* v. *Hands* (1); *White* v. *Southend Hotel Co.* (2); and it has been held to be a subject for compensation under the Lands Clauses Act: *Bourne* v. *Mayor, &c., of Liverpool.* (3) Supposing that the lease was sold by auction, the purchaser would be entitled to the benefit of the covenant, and he would, therefore, give more in consequence of the existence of the covenant. The covenant, therefore, must be taken into consideration in determining the fair market value of the claimants' interest in the land: *Dublin Corporation* v. *Dowling.* (4)

Cripps, K.C. (*Corrie Grant* with him), for the county council. The question, no doubt, is how the fair market value of the premises is to be ascertained, and it is wrong to take into consideration the damages which a particular brewery would sustain by the cessation of a particular tying covenant. A brewer who was anxious to make profit out of a public-house by letting it as a tied house would give more for the premises than another person; but, as Channell J. points out in *Bradford-on-Avon Assessment Committee* v. *White* (5), "That sum is obviously given for reasons personal to the brewer; it has nothing to do with the market value of the premises, though the possibility of its being given may be a matter tending to raise the market value."

The right way, then, of ascertaining the market value of the premises in question is to treat them as if there were no tying covenant. The value must be assessed for all time, and the damages for the breach of a particular covenant cannot be regarded. No doubt the existence of a covenant may be taken into consideration, but the fair market value must not be estimated by the profit made by such a covenant, but must be ascertained apart from the special conditions which are created by such a covenant. The arbitrator here has assessed the compensation on the principle that the brewery company would be entitled to damages for the extinction of the covenant. That must be wrong. Covenants such as this which run with the land may be taken into consideration in assessing the fair market value of the premises, but the value of the covenant to the particular brewery cannot be looked at.

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(1) (1890) 44 Ch. D. 503.

(2) [1897] 1 Ch. 767.

(3) (1863) 33 L. J. (Q.B.) 15.

(4) (1880) 6 L. R. (Ir.) 502.

(5) [1898] 2 Q. B. 630, at p. 638.

Bray, K.C., replied.

WRIGHT J. The question in this case is not at all an easy one to decide as regards the way in which it may work out in detail. It is whether under s. 21 of the Housing of the Working Classes Act, 1890, the value of a covenant tying a public-house is to be considered under the words "whenever the compensation payable in respect of any lands or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of this Act requires to be assessed . . . . the estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made of such lands, and of the several interests in such lands." The question stated in the award is wrong in form, because it describes the question as a question whether damage is to be considered. That is not the right question. It is rather, What is the value of the interest of the claimants in the land? No objection is taken to the award upon that technical ground; therefore I must try and deal with the question of substance. It seems to me that the market value of an interest in land must or may vary according to what covenants do or do not attach. Here the claimants were the assignees of a lease of a public-house under which they had to pay their superior landlord 47*l.* a year. They sublet it as a tied house at the same rental, namely, 47*l.* per annum; therefore they got no benefit from it except the benefit of this tying covenant. When they come to have their interest as assignees of the lease assessed there is nothing to assess, unless the value of this covenant is to be taken into account; and that is really the question which the parties have come here to try; not the way in which it ought to be assessed, if it is to be assessed. An interest such as that of the claimants must, I think, vary in its market value according to what covenants do or do not attach. Here, as I have said, there is no market value apparently, and so the arbitrator has practically found, apart from this covenant. But this covenant, according to the authorities, runs with the land, and does, according to the finding of the arbitrator, add some 600*l*. to the value of the interest of the claimants. In many cases I cannot conceive that a covenant running with the land ought not to be taken into consideration in ascertaining the value for the purposes of this Act. Covenants restrictive of building on the same land, or on other neighbouring land, must affect the value of the particular land in question; covenants not to use for trade, and all sorts of other covenants which may be easily imagined, may materially affect the value of the land and of any interest in it. I do not think it is any sufficient answer to point out that the value given by such a covenant as that in question is, or may be, a bare trading value. That is obviously the case, because it may depend on the landlord's trade, or the tenant's trade, or upon many other different circumstances. I do not think that that is enough to enable me to say that the benefit of the covenant is no more than a right to damages. Mr. Cripps admits that the covenant must be taken into consideration to some extent; he was a little unwilling to admit it at first, but I think he was quite right in doing so. Here it is plain on the finding of fact that a man in the market would give more because of the covenant. Obviously he would give nothing for this lease apart from the covenant unless a larger rent than 47*l*. could be got for it from an underlessee. He would give something for the claimant's interest with this covenant attached to it, because he could resell or reassign to the brewers. I cannot see any distinction in law between trade covenants and other covenants, provided that they run with the land. Of course, there are many trade covenants which do not run with the land; but when covenants run with the land, as it has been held that this covenant does, I am unable to draw any distinction between them except as regards quantum, which is not in question here. I think, therefore, that the award must be taken as standing with regard to the sum mentioned.

Order accordingly.

Solicitor for brewery company: *James E. Mason.*
Solicitor for county council: *W. A. Blaxland.*

A. P. P. K.

1903
Feb. 20.

In re AN ARBITRATION BETWEEN GOUGH AND THE ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD.

Waterworks—Lands compulsorily taken—Compensation—Special Adaptability.

In assessing compensation for land compulsorily taken for the purpose of making a reservoir, it may be right to take into consideration the fact that the land in question has peculiar natural advantages for supplying water to a district or area, apart from any value created or enhanced by the scheme or Act for appropriating the water to a particular local authority; and it is not necessary that it should be proved that the land in question could be similarly used by other specified local authorities.

AWARD stated by an umpire in the form of a special case.

By the Aspatria, Silloth and District Water Act, 1901, the Aspatria, Silloth and District Water Board was constituted for the purpose of constructing the works and taking the waters by the said Act authorized, and for supplying water within the districts and parishes therein mentioned, and exercising the powers in the said Act contained.

On October 14, 1901, the Water Board served on Miss Josephine Mary Agnes Gough a notice to treat for certain lands and water therein referred to, of which she was the owner in fee, for the purpose of making a reservoir. The Water Board and the claimant having failed to agree as to the amount of compensation to be paid to her for her interest in the said lands and water, arbitrators and an umpire were appointed, and at the request of the parties the umpire stated his award in the form of a special case.

The umpire found (inter alia) that owing to the natural configuration of the lands and water in question they were peculiarly adaptable for the construction of a reservoir. The question for the opinion of the Court was (amongst others) whether, in estimating the value of the land and easements to be acquired by the Water Board for the reservoir, the natural and peculiar adaptability for the construction of a reservoir of the lands in question was or was not a fit and proper matter for consideration as an element in the value thereof in the assessment of compensation.

If the Court should be of opinion that in estimating the value of the land and easements the natural and peculiar adaptability for the construction of a reservoir of the lands in question was not a fit and proper matter for consideration as an element in the assessment of compensation, the umpire reduced the amount of his award by the sum of 1636*l.* (1)

Balfour Browne, K.C. (*Roskill*, with him), for the Water Board. The umpire was not entitled to give anything in respect of the special adaptability of the place unless it could be shewn that the adaptability increased the market value of the property. There must be some commercial value in order to get compensation for special adaptability. It is not sufficient to shew that the place in question is specially adapted for the purpose for which it is proposed to take it. It must be proved that it is equally adaptable for other places. For example, in this case it was only shewn that the land and water in question had special adaptability for supplying water to the district under the control of the Board. That is not sufficient to allow of compensation being given in respect of special adaptability. In order to give a right to such compensation it must be shewn that the situation of the land and water in question was such that it would be equally adaptable as a reservoir for other places, such, for example, as Carlisle. To give compensation in respect of special adaptability for the particular scheme is unjust, as the adaptability is created, or at any rate enhanced, by the scheme itself. There must be at least some evidence that it is adaptable for other places to confer a right to compensation for special adaptability. In *Ossalinsky* (*Countess*) v. *Corporation of Manchester* (1) Grove and Stephen JJ. held that the compensation given in respect of the special adaptability of Thirlmere as a reservoir was right, because Thirlmere stood so high that it was adaptable as a reservoir, not only to Manchester, which was proposing to acquire it, but also to almost every large town in England.

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(1) Other questions were raised by the case, on which the award was ultimately remitted to the umpire by the Court, but, as they turned on the construction of various sections of the private Act of Parliament, it is not thought necessary to report the arguments and judgment on them.

Sir Ralph Littler, K.C., and *W. G. Clay*, for the claimant, were not called upon to argue this point.

WRIGHT J. (after discussing the other questions raised by the award, and directing that the award should go back to the umpire to be reconsidered). As regards the other point in the case, the 1636*l.* given in respect of the special value of this site, I do not see my way to interfere with the award on that point. It seems to me that, if there is a site which has peculiar natural advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation—if the site has peculiar natural advantages for supplying in that sense—apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, I think it may be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration. It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the particular scheme or Act of Parliament, or, in other words, there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters.

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(1) (1883) Reported in the Appendix to Brown and Allan's Law of Compensation, 1896, p. 718.

I cannot think that I am bound to hold in this case that there is no special adaptability value merely because it is impossible to put one's hand upon people who could compete for it at any given moment. I think that the existence of an area which would naturally receive the use of the water can be regarded as enough, and I do not think that any case to which I have been referred precludes me from taking that view.

I therefore answer that question in the affirmative.

Solicitor for Water Board: *T. R. Hargreaves, for F. Richardson, Aspatria.*

Solicitors for claimant: *Metcalfe, Birkett & Rowlatt, for Mounsey, Bowman & Graham, Carlisle.*

A. P. P. K.

C. A.

1903

Jan. 28.

[IN THE COURT OF APPEAL.]

ZIMBLER AND ANOTHER v. ABRAHAMS.

Landlord and Tenant—Agreement for Tenancy—Failure as Present Demise—Operation as Agreement for Future Lease—Specific Performance.

The agent of the owners of a house signed a document by which he purported to "have let" the house to the defendant at a weekly rental, and which continued: "I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return to him the 6*l.* he has paid me on taking possession of the house." The plaintiffs, treating the defendant as a weekly tenant, gave him notice to quit, and brought this action to recover possession of the house:—

Held, that the document could not, having regard to its terms, be treated as creating a weekly tenancy, and that whether it purported to be an attempt to create an immediate demise for the life of the defendant, which was void at law as not being by deed, or an agreement to grant a lease for the life of the defendant, he was entitled to specific performance.

Browne v. *Warner*, (1807) 14 Ves. 156, 409; 9 R. R. 259, and *Parker* v. *Taswell*, (1858) 2 De G. & J. 559, followed.

Cheshire Lines Committee v. *Lewis*, (1880) 50 L. J. (Q.B.) 121, considered.

Appeal from a judgment of Darling J. at the trial of the action without a jury.

The action was brought to recover possession of a house. The defendant had been a weekly tenant of the house, and in October, 1896, one Beron, as agent for the owners of the house, signed a document in the following terms:—

"London, Oct. 5, 1896.—I the undersigned, S. Beron, have let to Mr. Abrahams" (the defendant) "the house situate at 24, Morgan Street, Commercial Road, E., at a weekly rental of 23*s.*, and I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return to him the 6*l.* he has paid me on taking possession of the house.—S. Beron."

On September 30, 1901, notice to quit was given to the defendant on behalf of the plaintiffs, and as he refused to go out this action was brought. An application was made by the plaintiffs under Order XIV., and the action was directed to be tried as a short cause.

The learned judge gave judgment for the defendant, on the ground that he was not satisfied that there had been any breach of the condition as to the payment of rent as alleged by the plaintiffs.

The plaintiffs appealed.

Tindal Atkinson, K.C., and *E. T. Holloway*, for the plaintiffs. This document is a memorandum of a completed transaction between the parties, and not an agreement relating to the future. If the tenancy created by it was a weekly tenancy, proper notice to quit has been given. If the memorandum does not create a weekly tenancy, it purports to create a tenancy for life, which is equivalent to a freehold, and that can only be created by deed: *Doe* d. *Warner* v. *Browne* (1); *Cheshire Lines Committee* v. *Lewis*. (2) Specific performance cannot be granted and has not been claimed. In *In re King's Leasehold Estates* (3) all that was decided was that the tenant's interest was not a yearly one, but was to continue as long as the lessor's interest continued. *Doe* d. *Warner* v. *Browne* (1)

(1) (1807) 8 East, 165; 9 R. R. 397.
(2) 50 L. J. (Q.B.) 121.
(3) (1873) L. R. 16 Eq. 521.

was considered by Lord Eldon in *Browne* v. *Warner* (1); but the decision was on a demurrer, and left open the question whether the document in that case was an agreement for a lease, in respect of which, though it could not be enforced at law, equity would give relief. But Lord Eldon said that, had the document been an actual lease, the question had been decided rightly at law in *Doe* d. *Warner* v. *Browne*. (2)

Edgar Foà, for the respondent. The defendant is entitled to specific performance, and can claim an estate for life conditional on regular payment of the agreed weekly rent.

The document of letting in this case is not an "actual lease" within the meaning of Lord Eldon's words in *Browne* v. *Warner* (1), but a mere memorandum of a past agreement. But, even assuming that it is an actual lease, this makes no difference in the claim to specific performance. The dicta of the judges in *Cheshire Lines Committee* v. *Lewis* (3), which profess to be directly based on *Browne* v. *Warner* (1), were not necessary for the decision and ought not to be followed. All that Lord Eldon meant in *Browne* v. *Warner* (1) was that (livery of seisin not having been made) an estate for life could not have been conveyed without a deed of some kind, operating as a release, and not that the document of letting, which was executed before possession was given (4), could have passed such an estate if it had been made by deed: see Co. Litt. ss. 59, 459. But, however this may be, the attention of the Court in *Cheshire Lines Committee* v. *Lewis* (3) was never called to the fact that the law had been altered since Lord Eldon's time, and the statute 8 & 9 Vict. c. 106 had been passed, which (by s. 3) required a deed in all cases for the conveyance of a freehold. That statute, however, only says that a feoffment not evidenced by deed shall be "void at law"; and this expression must receive the same construction as in the other part of the same section, which deals with leases required by law to be in writing and henceforth declared to be void at law unless made by deed.

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(1) 14 Ves. 156, 409; 9 R. R. 259.

(2) 8 East, 165; 9 R. R. 397.

(3) 50 L. J. (Q.B.) 121.

(4) See *Doe* d. *Warner* v. *Browne*, 8 East, 165; 9 R. R. 397.

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It was well established both at law and in equity before the Judicature Acts that a lease so avoided is only void as a lease, but is good as an agreement. The only effect of the statute is that such a document creates no estate and passes no interest: per Blackburn J. in *Bond* v. *Rosling*. (1) Moreover, Courts of Equity were always willing to grant specific performance of such an agreement, and this quite irrespective of the question whether the instrument of letting was an actual lease or a mere agreement: *Parker* v. *Taswell* (2), per Lord Chelmsford L.C. [He also cited *Mardell* v. *Curtis*. (3)]

Tindal Atkinson, K.C., in reply, referred to *Wood* v. *Beard*. (4)

VAUGHAN WILLIAMS L.J. I think that the judgment of Darling J. must be affirmed, but that the terms of it must be somewhat varied.

If one takes the case of an attempt to create an interest in land which for some reason or other fails, and, in the same document in which the interest in land was attempted to be created, there is to be found an agreement by the grantor that he will not, for the duration of the life of the grantee, take any steps to enforce his, the grantor's, right to have possession of the land, then, in my opinion, unless the agreement creates a leasehold estate, or some estate beyond that, the agreement cannot be enforced at law. It may be as plain as possible that the grantor and the grantee did not intend that any steps should be taken by the grantor to recover possession of the land during the life of the grantee. However plain that may be, unless the agreement creates in the grantee in some way or other an effective interest in the land, the grantor has a right to recover possession, and the grantee has no right to defeat an action of ejectment by the grantor, but has only a right to recover damages for breach of covenant. To my mind, therefore, the question in this case is whether this document either created an immediate interest in land in the grantee, or gave him a right to have the grantor execute such a document as would give the grantee an interest, consonant with the agreement, which would defeat the grantor's claim to recover possession.

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(1) (1861) 1 B. & S. 371; 30 L. J. (Q.B.) 227.

(2) 2 De G. & J. 559; 27 L. J. (Ch.) 812.

(3) W. N. (1899) 93.

(4) (1876) 2 Ex. D. 30.

To my mind it is plain that the document of October 5, 1896, did not create as between Beron and the defendant an immediate interest in land; indeed, it did not vest in the defendant any interest in land whatever. That is so, among other reasons, because of the statute 8 & 9 Vict c. 106, which requires a conveyance of an interest in land (subject to certain exceptions) to be by deed. It is said that though this is so, and the document not being under seal cannot be construed as an effective present demise, yet it may be treated as an agreement to let the premises, and the defendant may come to a Court of Equity and ask for specific performance of that agreement. It is said that is equally so whether on the face of the instrument it appears to be an agreement to grant a lease or to be a present demise which fails through not being under seal. For the first proposition the decision of Lord Eldon in *Browne* v. *Warner* (1) is relied on, and in support of the second reference is made to the judgment of Lord Chelmsford in *Parker* v. *Taswell*. (2) The particular passage relied on is at p. 570 of the report: "But the instrument now in question could not amount to a lease, because it was not signed by an agent lawfully authorized by writing, nor was it signed in the name of the principal, so as to render it a lease binding upon the lessor. Assuming, however, that it had been signed in the name of the lessor, and would, therefore, have amounted to a lease, as containing words of present demise, yet there is nothing in the Act to prevent its being used as an agreement, though void as a lease because not under seal." On those authorities I suppose that I am bound to take it that, unless there is something to be found in the document itself which renders it impossible that specific performance should be granted, the defendant is entitled to ask for specific performance whichever of the alternative views that I have mentioned is applicable to the document. It is not material to state whether I approve of those decisions or not, though I must say that I feel strongly that the result of Lord Chelmsford's decision is to neutralize the effect of the statute

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(1) 14 Ves. 156, 409; 9 R. R. 259.

(2) 2 De G. & J. 559.

Vaughan Williams L.J.

8 & 9 Vict. c. 106. If the defendant has a right under this document to specific performance, there is an end to the plaintiffs' claim, unless it can be shewn that the contemplated interest has come to an end. I have then to look at the document and ask myself what interest was agreed to be granted by it. I have a difficulty in saying that the interest was to be merely a tenancy from week to week, for that would be to give effect to the earlier part of the document and none to the latter portion. If that is not to be taken as the meaning, the alternative seems to be that it was intended to grant to the defendant a lease of the house for his life subject to two conditions, one that the lessor might turn him out if he did not pay his rent regularly, and the other that the defendant could determine his own life estate by moving out. Speaking for myself I should, in the absence of authority, have doubted whether equity would have granted specific performance of an agreement of that sort, because the lessee may at once determine his life estate and make the lease futile.

If the defendant is entitled to specific performance, it follows that he is not liable to be ejected; but I do not think that our order ought to end there, for it seems to me that the plaintiffs ought to recover in this action unless the defendant, who must be treated as if he had answered the claim of the plaintiffs by a counter-claim for specific performance, within fourteen days elects to ask for specific performance of this agreement, which would be granted upon condition of his paying all the arrears of rent now due. If this is carried out the appeal will be dismissed.

STIRLING L.J. I agree. If the document of October 5, 1896, is to be treated as being an actual demise, then, by reason that it was not a deed, according to old decisions and the more modern case of *Cheshire Lines Committee* v. *Lewis* (1) it is at law of no effect. Having regard, however, to the decision of Lord Chelmsford in *Parker* v. *Taswell* (2), we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is a fortiori. The opinion of Lord Eldon in *Browne* v. *Warner* (1) tended in this direction. In *Cheshire Lines Committee* v. *Lewis* (2) Brett L.J. doubted whether specific performance could be granted of the document as an agreement for a lease because the same difficulties of inconsistency and repugnancy would be met with as in treating it as a lease. But, in *Mardell* v. *Curtis* (3), Cozens-Hardy J. granted specific performance in a case somewhat similar to the present, and I see no reason to dissent from the decision in that case. That being so, the consequences pointed out by my Lord follow. I think that the defendant is entitled to relief upon the terms of the agreement being fully performed by the defendant up to the date at which specific performance is obtained.

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(1) 50 L. J. (Q.B.) 121.

(2) 2 De G. & J. 559.

MATHEW L.J. I am of the same opinion. I think that the document must be construed as intending to create an interest in favour of the defendant. It is plain that it was intended to impose a burden on the estate of the lessors for the benefit of the lessee. The interest of the lessee was the right to occupy the premises as long as he regularly paid the rent which was reserved. It is only in this Court that there has been an opportunity of raising this question of specific performance, and I agree that the defendant is entitled to that relief upon the terms that have been mentioned.

Appeal dismissed on defendant complying with the terms imposed.

Solicitors for plaintiffs: *Brighten & Lemon.*
Solicitors for defendant: *G. Vandamm & Co.*

(1) 14 Ves. 156, 409; 9 R. R. 259.
(2) 50 L. J. (Q.B.) 121.
(3) W. N. (1899) 93.

A. M.

1903
Feb. 23.

MARDORF *v.* ACCIDENT INSURANCE COMPANY.

Insurance—Accident—Construction of Policy—"Intervening Cause."

A person insured himself with the defendants under a policy whereby the defendants agreed to pay him a certain sum in case he should be injured by accidental violence and should die within three months of its occurrence, if the injury should be the "direct and sole cause" of his death. The policy was subject to the condition that it should not apply to "death . . . . caused by or arising wholly or in part from" any "intervening cause." The assured on July 2 accidentally inflicted a wound on his leg with his thumb-nail. His leg became inflamed, and on July 9 erysipelas had set in. This was followed on July 12 by septicæmia, and on July 16 by septic pneumonia, of which complaint he died on July 22. It was conceded by the defendants that the septic germs, the development of which resulted in the man's death, were introduced into his body at the time of the infliction of the wound:—

Held, that the erysipelas, septicæmia, and septic pneumonia were not "intervening causes" within the meaning of the policy, but merely different stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and that the man's death was directly and solely caused by the accidental injury to his leg.

CASE stated by arbitrators in the matter of a claim by the executors of John Mardorf, deceased, against the Accident Insurance Company.

In September, 1895, John Mardorf effected an insurance for 1000*l*. with the Accident Insurance Company, under a policy whereby, in the event of the insured sustaining any personal injury caused by external and accidental violence, the company bound themselves to pay to the insured or his personal representatives compensation as follows:—

"A. If such injury shall be the direct and sole cause of the death of the deceased within three months of the happening of the injury . . . . 1000*l*." If the injury only caused total or partial disablement, less sums were payable.

"E. And the company hereby further agrees that if the insured, not being entitled to any other form of compensation under this policy, shall independently of all other causes be totally and absolutely incapacitated by disease as defined in the notices indorsed hereon from attending to business of any kind, then the company shall pay for every week during which he shall be so incapacitated compensation at the rate per week of 6*l.*"

It was provided that the policy and insurance thereby effected should be subject to the conditions and notices thereon indorsed. Among the conditions in the policy was the following: "Provided further that this policy with reference to compensation for injury to the insured applies only to death directly and solely caused by some outward and visible means of which proof satisfactory to the directors can be furnished, and does not apply to death caused by or arising wholly or in part from disease or other intervening cause, even although the disease or other intervening cause may either directly or otherwise be brought on or result from accident."

Among the notices indorsed on the policy was the following: "The word 'disease' in this policy means 'typhus,' 'scarlet fever,' or 'typhoid fever,' 'smallpox,' 'diphtheria,' or 'measles.'"

John Mardorf regularly paid the premiums on the policy and died under the circumstances hereinafter set out on July 22, 1901, and at the time of his death the policy was in force.

The executors claimed 1000*l.*, the sum assured, from the insurance company, who denied their liability, and the dispute was referred, pursuant to the arbitration clause in the policy, to arbitrators.

At the hearing before the arbitrators the following facts were proved:—

John Mardorf was a master baker, fifty-nine years of age. On July 2, 1901, after a long day's work, he came home in the evening hot and tired; and whilst he was taking off his socks one sock adhered to his skin, and in trying to free it he inflicted a wound with his thumb-nail on the side of his leg.

Between July 2 and July 7 the deceased attended to business, but complained of feeling ill, and took to his bed on July 7. On July 8 a doctor called and saw the wound, which he pronounced to be in a septic condition.

On July 9 the doctor again examined the leg. Erysipelas had then set in. The erysipelas had originated in the wound.

On or about July 12 septicæmia set in, and some time between that date and July 16, in the opinion of the doctor, septic pneumonia set in, as there were symptoms of it on the 16th, and a consultation was had with another medical man. On July 22 Mardorf died. Septic pneumonia was the cause of death, and in the opinion of the medical men it was consequent upon the wound, and but for the wound he would not in their opinion have had septic pneumonia.

The question for the opinion of the Court was whether the death of John Mardorf was a death covered by the policy.

Norman Craig, for the plaintiffs. The injury to the man's leg was the direct and sole cause of his death. The case of *Fitton* v. *Accidental Death Insurance Co.* (1) is an authority in favour of the plaintiffs. There, in a policy against death directly and solely caused by accidental injury, there was an exception of "hernia or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing such death directly or jointly with such accidental injury." The assured accidentally fell and ruptured his bowels, immediately causing strangulated hernia, which disease necessitated a surgical operation from which he died. It was held that the death was covered by the policy. The kind of hernia there excepted was a disease arising in the system, and not one immediately caused by the injury. So here the septic pneumonia is not within the exception of "disease or other intervening cause," for the germs of that disease were obviously introduced into the assured's body by the same instrument which inflicted the wound, and the death was consequently directly caused by the wound. In *Smith* v. *Accident Insurance Co.* (2) the exceptions in the policy included "erysipelas or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." There the assured cut his foot. Within five days erysipelas supervened, being caused by the wound, and two days later he died of that disease. Held that the death was not within the policy, the case of *Fitton* v. *Accidental Death Insurance Co.* (1) being distinguished on the ground that in that case the policy contained no reference to secondary causes. The absence of any such expression equally distinguishes the present case. Assuming that the septic condition was communicated at the time of the accident, then the erysipelas, septicæmia, and septic pneumonia were not new and intervening causes, but progressive stages in the development of the disease. They meant nothing more than that the poison had reached a new part of the body. At first it was local, then it extended to the blood, and finally reached the lungs. Further, in addition to the fact that the "disease" contemplated by the exception in the present policy is a new and intervening disease, erysipelas, septicæmia, and septic pneumonia are not diseases at all within the meaning of the policy, for they are not amongst the diseases mentioned in the definition clause. [He also referred to *Winspear* v. *Accident Insurance Co.* (2) and *Lawrence* v. *Accidental Insurance Co.* (3)]

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(1) (1864) 17 C. B. (N.S.) 122.

(2) (1870) L. R. 5 Ex. 302.

Spencer Bower, for the defendants. Although there is no finding in the special case to that effect, the defendants are willing that the case should be dealt with on the footing that the poison was introduced at the time of the accident. Still the accident was not the direct and sole cause of the death, for not in one case out of a thousand would it have been followed by the same result that it was here. The death was due not so much to the accident as to the inflammatory condition of the man's body. The three diseases which supervened in the present case were diseases within the policy. This was a compound policy, insuring first against external and accidental violence, and secondly, in clause E, against disease; and the definition of "disease" in the notices was intended only to apply to the second branch of the policy, and not to the condition attached to the first branch, for no one ever heard of scarlet fever "resulting from accident." Then if it was a disease within the policy, it was an "intervening" disease, just as much as if a man dies of typhoid fever brought on from eating oysters the typhoid fever is an intervening disease. In such a case the oysters could not be regarded as the sole cause of death, for death would not be the necessary consequence of eating them. *Smith* v. *Accident Insurance Co.* (1) is an authority in the defendants' favour. *Fitton* v. *Accidental Death Insurance Co.* (2) was decided on demurrer to a plea which admitted that the hernia was immediately consequent upon the fall and was part of the accident. Here, although it is admitted that the poison was introduced at the time of the accident, it is not admitted that the septic pneumonia which resulted from it was part of the accident.

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(1) 17 C. B. (N.S.) 122.
(2) (1880) 6 Q. B. D. 42.
(3) (1881) 7 Q. B. D. 216.

Norman Craig, in reply.

WRIGHT J. These cases are not easy to decide; but I think that judgment must be for the plaintiffs. Mr. Bower agrees to treat the case as if there were a finding that the septic germs were introduced into the wound at the time that it was inflicted. I think he was right in so doing, for had the case been remitted to the arbitrator, he would undoubtedly have so found the facts. But when once it is agreed that the same instrument inflicted the wound and introduced the poison, it seems to me to follow that the morbid condition of the lungs which ultimately proved fatal was directly and solely caused by the wound. Take the case of a man being bitten by a mad dog and eventually dying of hydrophobia: surely it would be accurate to say that the death was directly and solely caused by the bite, although what immediately preceded the death was the disease resulting from the introduction of the poison into the system. With regard to the contention that the case falls within the exception of death caused wholly or in part by disease or other intervening cause, I may say at once that I think it is out of the question to regard the septic pneumonia

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(1) L. R. 5 Ex. 302.

(2) 17 C. B. (N.S.) 122.

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or the earlier stages in the spread of the poison as diseases within the policy, for the language of the definition in the indorsed notice is perfectly general, and, whatever the intention of the draftsman of the policy may have been, applies as well to cases falling within clause A as to those falling within E. Nor, for the reasons which I have already given, can the septic pneumonia, &c., be regarded as intervening causes.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Stacpoole, Batters & Stacpoole.*
Solicitors for defendants: *Wynne-Baxter & Keeble.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1903

March 4.

ANDERSON *v.* RAYNER.

Ship—Seaman injured in Service of Ship—Expenses of Medical Attendance—Expenses after Seaman's Return to Home Port—Merchant Shipping Act, 1894 (57 & 58 *Vict.* c. 60), s. 207, *sub-s.* 1.

A shipowner is not liable under the Merchant Shipping Act, 1894, s. 207, sub-s. 1, for expenses of necessary surgical and medical attendance upon a seaman injured in the service of the ship incurred after the seaman has been brought back to a port of the United Kingdom.

APPEAL from the judgment of Wills J. in an action tried before him without a jury.

The action was brought to recover from the defendant expenses of medical attendance claimed by the plaintiff under the Merchant Shipping Act, 1894, s. 207, sub-s. 1.

The plaintiff was the master of a schooner belonging to the defendant, which traded between Liverpool and Falmouth. Shortly after sailing from Liverpool on a voyage to Falmouth the plaintiff met with an accident, while engaged in the service of the ship, by which his leg was injured. The vessel thereupon put back to Liverpool, where the plaintiff was landed, and the plaintiff there incurred the expenses, to recover which the action was brought, in respect of surgical and medical advice and attendance rendered necessary by his injury. Wills J. gave judgment for the plaintiff. (1)

Horridge, K.C., and *T. F. D. Miller*, for the defendant. It is submitted that, upon the true construction of s. 207, sub-s. 1, of the Merchant Shipping Act, 1894, which is in substance a re-enactment of s. 228, sub-s. 1, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the words "until, &c.," govern all that has gone before, and apply therefore not only to the expenses of maintenance of the injured seaman, but also to the expenses of medical attendance upon him. The general scope of that section and other sections of the Act, such as ss. 186 and 190, is to prevent British seamen from being left stranded abroad, ill or in distress, and to ensure their being brought back to a home port, and cared for until so brought back. It never could have been intended to impose on the shipowner, in respect of an injury to a seaman not caused by any negligence of his, or perhaps caused by the seaman's own negligence, a liability to pay for medical attendance upon the seaman, after he is brought back to a home port. Such medical attendance might conceivably be necessary more or less for the rest of the seaman's life, which might last for many years.

W. F. Taylor, K.C., and *G. D. Keogh*, for the plaintiff. It is clear from the terms of the section that the expenses therein provided for are not confined to expenses incurred before the seaman is brought back to a home port, for the expense of his burial, if he dies, is to be defrayed by the shipowner in any case. There is good reason why the Legislature should make a distinction for this purpose between expenses of medical attendance and maintenance. It is reasonable that, when a seaman is injured in the service of the ship, the shipowner should pay for all necessary medical attendance upon the seaman so injured, even after he is brought back to a home port, because but for the injury that attendance would not have been requisite. Whether he met with an accident or not, the seaman would have to be maintained. The construction contended for by the defendant would deprive the section of all effect in the case of coasting vessels, because such vessels do not carry a medical man, and, if a seaman is injured, there really cannot be any expenses of medical attendance on board the ship. The statute being passed for the benefit of the seafaring class, it ought to be construed liberally in their favour.

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(1) The Merchant Shipping Act, 1894, s. 207, sub-s. 1, provides as follows: "If the master of, or a seaman or apprentice belonging to, a ship receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured, or dies, or is brought back, if shipped in the United Kingdom, to a port of the United Kingdom, or if shipped in a British possession to a port of that possession, and of his conveyance to the port, and in case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages."

Horridge, K.C., in reply.

VAUGHAN WILLIAMS L.J. I cannot assent to the suggestion of the plaintiff's counsel that it is an established canon of construction that, where you have an enactment passed in favour of a particular class, it must be construed liberally. On the contrary, I think the old rule still prevails that, where you are dealing with an enactment which imposes on members of the community liabilities beyond those which would be imposed upon them by the common law, the enactment ought not to be construed as imposing upon them any liability that is not clearly indicated by its language. In the present case I think that, to say the least, it is by no means clear upon the terms of the enactment in question that it was thereby intended to impose on the shipowner any liability in respect of the provision of medical attendance for the injured sailor, after he has been brought back to a home port. Looking at the various provisions of the section, I think that, notwithstanding the provision as to the expenses of burial, the general intention, as far as one can gather it from the whole of the enactment, is that the liabilities thereby imposed on the shipowner shall not continue after the sailor is brought back to a home port. I think the appeal must be allowed.

STIRLING L.J. I am of the same opinion. I do not think that, upon the true construction of the section, it was intended to impose on the shipowner a liability for medical attendance upon an injured seaman, which may possibly extend over a period of many years after he has been brought back to a home port. Regard being had to the circumstance that the right to maintenance admittedly ceases on arrival at a port of the United Kingdom, the intention appears to me to be that the liability of the shipowner to pay for medical attendance should only continue until the seaman is brought back to a home port.

MATHEW L.J. I am of the same opinion. If the contention for the plaintiff were correct, a very serious liability would be thrown on shipowners. The section in question is substantially a repetition of the provisions of s. 228, sub-s. 1, of the Merchant Shipping Act, 1854. It does not appear to have occurred to any one's mind up to the time when the claim in this action was made that either the present or the former enactment bore the construction now suggested on behalf of the plaintiff. In my opinion that fact is not to be lost sight of in deciding what construction we ought now to put on the section. The general impression has, I think, been that the scope of the legislation on this subject was that the British seaman, when injured in the service of the ship, should be entitled as against the shipowner to have provision made for bringing him back to a home port, and to be cared for by the shipowner until he is so brought back.

Appeal allowed.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for defendant: *Holman, Birdwood & Co., for Forshaw & Hawkins, Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.

1903

March 6.

GAS LIGHT AND COKE COMPANY *v.* CANNON BREWERY COMPANY.

Gas—Arrears of Gas Rate—Right to recover from incoming Tenant—Gasworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 *&* 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Company's Act*, 1872 (35 *&* 36 *Vict. c. xxiii.*), *s.* 18.

By a special Act of the plaintiffs, a gas company, it was provided that "in case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and the incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him to do so."

Arrears being due to the plaintiffs from the tenant of premises in respect of gas supplied to him by the plaintiffs, he sold the lease of the premises and the goodwill of the business, which he there carried on, to the defendants, who continued to carry on the business upon the premises:—

Held, overruling the judgment of the Queen's Bench Division in *Gas Light and Coke Co.* v. *Mead*, (1876) 45 L. J. (M.C.) 71, that the effect of the above-mentioned section was to entitle the plaintiffs to recover the arrears due to them from the defendants.

Appeal from the judgment of a Divisional Court (Lord Alverstone C.J., Darling J. and Channell J.) on an appeal from the judge of the Clerkenwell County Court.

The action was for the sum of 10*l.* 1*s.* 3*d.* in respect of gas supplied by the plaintiffs as after mentioned.

The plaintiffs were a company established for the supply of gas in the metropolis under special Acts, incorporating the Gasworks Clauses Act, 1847, and to which the Metropolis Gas Act, 1860, was applicable.

It appeared that one Lowles had been the lessee and occupier of premises in the Harrow Road, where he carried on the business of a grocer with an off wine and spirit licence. He sold the lease of the premises and the goodwill of the business to the defendants, who continued to carry on the business upon the premises. At the time when Lowles gave up possession a sum of 10*l.* 1*s.* 3*d.* was due from him to the plaintiffs for gas supplied on the premises. It was provided by the Gas Light and Coke Company's Act, 1872, s. 18, as follows: "In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him to do so." By s. 70 of the Gas Light and Coke Company's Act, 1868 (31 & 32 Vict. c. cvi.), in case of default by any person liable to any payment in respect of a supply of gas by the company, or the use or repair of any meter, a remedy was given by application to a magistrate for a warrant of distress; and by s. 71, by way of additional remedy, where any person fails to pay any gas rent or meter rent or sum due or payable by him to the company, the company may recover the same in any Court of competent jurisdiction for the recovery of debts of the like amount.

The county court judge gave judgment for the defendants, and on appeal the Divisional Court affirmed his decision on the authority of *Gas Light and Coke Co* v. *Mead.* (1)

Danckwerts, K.C., and *Roland E. Vaughan Williams*, for the plaintiffs. The decision in *Gas Light and Coke Co.* v. *Mead* (1) was wrong. It appears to have been supposed by the judges

(1) 45 L. J. (M.C.) 71.

who gave that decision, and, as will be seen from the observations made by them during the argument, it formed the ground of their judgment, that the gas company had a right in such a case as this to refuse to supply gas to an occupier of premises on account of his predecessor's default. It is clear, however, on reference to the legislation on the subject, that they have no such right. Sect. 16 of the Gasworks Clauses Act, 1847, only gives the right of cutting off the supply from the premises of the defaulter, and does not apply to premises which have ceased to be the premises of the defaulter. Therefore, unless the effect of s. 18 is in the excepted cases to give a right to recover the arrears from the incoming tenant, no effect can be given to it at all. The right view of the section is, it is submitted, that taken by Rigby L.J. in his judgment in *Paterson* v. *Gas Light and Coke Co.* (1) No doubt in one sense his observations were only obiter, but they formed an essential part of the reasoning by which he came to the conclusion at which he arrived.

A. H. Spokes, for the defendants. It is a most extraordinary provision to make a person liable for a debt that another person incurred, and the Court will not construe the section as so providing, unless the words of it very clearly compel them to do so. The word "require" is not at all an appropriate word for imposing a personal liability to pay. The appropriate word would be "recover." It is submitted that the true meaning of the section is that it was intended to allow the gas company in the excepted cases to make the payment of the arrears by the incoming tenant a condition precedent to the further supply of gas to him. The exceptions introduced by the word "unless" should be read as exceptions from the whole of the section. The effect would then be that the gas company are not to require from an occupier payment of arrears due from his predecessor, or to refuse to supply him with gas in default of payment of such arrears, except in the two excepted cases, in which cases they may require payment of the arrears from the occupier and refuse a further supply of gas, unless they are paid. Such a construction does very little violence, if any, to the words, and is much more reasonable than a construction which would impose a personal liability on the occupier in respect of another man's debt.

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(1) [1896] 2 Ch. 476, at p. 485.

Danckwerts, K.C., in reply.

VAUGHAN WILLIAMS L.J. We have to decide in this case whether or not, having regard to the terms of s. 18 of the Gas Light and Coke Company's Act, 1872, the gas company has a right to sue the successor in occupation of premises for arrears which his predecessor failed to pay, in a case falling within the exceptions in the section which are introduced by the word "unless." The argument put forward by the defendants' counsel is as follows. He says that the word used in the section is not "recover," but "require," and that, in cases falling within the exceptions, the right of the gas company is not to recover the arrears by proceedings under s. 70 or 71 of the gas company's Act of 1868, but merely to insist on payment of them as a condition precedent to any further supply of gas. In support of that argument our attention was called, as that of the Divisional Court had been, to the case of *Gas Light and Coke Co.* v. *Mead.* (1) It was contended that the decision in that case was a direct authority in favour of the defendants in the present case. I think that is so, and the judges in the Divisional Court likewise took that view. We have therefore to consider whether that decision was right. In my judgment it was not. It was urged that, the case having been decided as long ago as 1876, it ought not lightly to be overruled. I agree; but, nevertheless, if on careful consideration of that decision we come clearly to the conclusion that it was wrong, we must, I think, give effect to that conclusion. The judgments of Blackburn J. and Lush J., who decided the case, are very short, and, as has been pointed out by counsel, it is really necessary, in order to understand their effect, to read also the observations made by the judges during the argument. When one looks at the judgment by the light of those observations, it is plain that the learned judges assumed as the basis of their judgment that s. 16 of the Gas-

(1) 45 L. J. (M.C.) 71.

works Clauses Act, 1847, gave a right to the gas company to cut off the successor's supply of gas on account of non-payment of his predecessor's arrears. But, when that section is looked at, it will be seen that it gives no such right to the gas company. That section provides that, if any person supplied with gas neglects to pay the rent due for the same, the undertakers may stop the gas from entering "the premises of such person" by cutting off the service-pipe, or by such means as the undertakers shall think fit. That section clearly does not enable the gas company to cut off the supply of gas from the premises of a successor in occupation on account of the default of his predecessor. Dealing with a change of tenancy, s. 39 of the Metropolis Gas Act, 1860, provides that, "in case any consumer leave the premises where gas was supplied to him without paying to the gas company the rate or meter rent due from him, the gas company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears; but the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him so to do." It is clear, in my opinion, that the effect of these enactments combined is that in all cases the gas company are bound, in the absence of collusion between the outgoing and incoming tenant, to supply the tenant of premises with gas, notwithstanding arrears left unpaid by his predecessor in the occupation of the premises in respect of gas supplied to him. The suggestion, therefore, that the effect of s. 18 is to allow the gas company in the excepted cases to require the payment of such arrears from the occupier of the premises, as a condition precedent to a future supply of gas, appears to fail; because the gas company have no power to refuse to supply gas to any occupier of premises on the ground of non-payment of arrears by his predecessor, except in the case where there is collusion between the outgoing tenant and the incoming tenant; by which I understand to be meant a case where the incoming tenant is acting in concert with his predecessor to

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GAS LIGHT AND COKE COMPANY v. CANNON BREWERY COMPANY.

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prevent the gas company from recovering arrears, a possible instance of which is the case suggested in the argument where the supposed successor is not really such, but the outgoing tenant continues to be interested in the business carried on, notwithstanding an ostensible transfer of it. Under these circumstances I think it is plain that the company had no such right of stopping the supply of gas as the learned judges supposed, and therefore they had no power of compelling the payment of the arrears by a refusal to supply gas to the incoming tenant. Furthermore the words at the end of s. 18 itself shew that they can only refuse to supply gas to an occupier of premises on the ground of non-payment of arrears by his predecessor where there is collusion between the outgoing and incoming tenant. That being so, I think we must give some meaning to the word "require," and the only reasonable meaning seems to be that put upon it by Rigby L.J. in the case of *Paterson* v. *Gas Light and Coke Co.* (1), in the observations which he made in the course of giving judgment. Those observations were no doubt only obiter dicta, but they express very clearly his view that in cases included in the exceptions mentioned in s. 18 the gas company were intended to have the right of suing the occupier of premises for arrears unpaid by his predecessor. It does not appear to me, when one comes to look into the matter, that there is really any hardship in such a case upon the successor. It would, I think, be a harsher procedure, if the gas company were entitled to refuse to supply the occupier with gas, or to cut off his supply, on account of non-payment of arrears due from his predecessor. The Legislature, when they were making the supply of gas to an occupier compulsory, and only relieving the gas company from the obligation to supply gas where there was collusion with regard to non-payment of arrears between an outgoing and an incoming tenant, seem to have thought that it would not be reasonable not to give the gas company some remedy in respect of such arrears; and the gas company, as it seems, has no remedy unless one reads the word "require" as implying that they may have personal recourse to the succeeding occupier, and recover the arrears from him. Under these circumstances I do not think that we ought to follow the judgment of the Queen's Bench Division in *Gas Light and Coke Co.* v. *Mead* (1) It is not disputed that this case comes within one of the exceptions mentioned in s. 18. The result is that in my opinion the effect of s. 18 of the plaintiffs' Act of 1872 is that the plaintiffs are entitled to recover the sum claimed for arrears by action under s. 71 of their Act of 1868. I think the appeal must be allowed.

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(1) [1896] 2 Ch. 476.

STIRLING L.J. This case is not without difficulty, whether we have regard to the words of s. 18 of the Act of 1872, or to the cases in which the Courts have had occasion to consider that section. It is no doubt an unusual piece of legislation to make a person who has not incurred a debt liable to pay it. Nevertheless, there may be cases in which justice requires that this should be done. What we have to consider is whether the language of the enactment in this case is sufficiently clear to entitle us to attribute the intention of so doing to the Legislature. Stating the effect of s. 18 shortly, it provides that, where an outgoing tenant has left the premises without paying arrears due to the gas company in respect of gas supplied to him, the company is not to require payment of the arrears from the next tenant except in two cases, under one of which the present case comes; and the section goes on to provide that the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by the Act, on being required by him to do so. The question which we have to determine is whether that section imposes on the incoming tenant in the excepted cases the obligation to pay the arrears. It has been argued that the section only allows the gas company to make the payment of the arrears a condition precedent to a further supply of gas to the incoming tenant. The result of that would be that, unless the gas company have the right of refusing to supply gas to the incoming tenant until the arrears are paid, they have no other

(1) 45 L. J. (M.C.) 71.

remedy: for the argument is that, if the occupier requires a supply of gas, and the company proceed to supply him, he is not liable for the arrears, and the only right of the company is to refuse to supply the incoming tenant with gas and so put pressure upon him to pay the arrears. I do not think that that is the fair construction of the language of the section, and in support of that view I may refer to the opinion expressed by Lush J. in *Gas Light and Coke Co.* v. *Mead* (1), where he said that, looking only to the construction of the private Acts without reference to the previous legislation upon the subject in the public Acts incorporated with them, the inference would be obvious that the liability existed. Therefore his opinion was that the construction which the Court were there putting on the section could only be derived from consideration of the previous public legislation on the subject. Again the opinion of Rigby L.J. in the case of *Paterson* v. *Gas Light and Coke Co.* (2) is to the same effect. So that we have the opinion of two learned judges that the natural meaning of the section, taken by itself, is not the meaning placed upon it in the case of *Gas Light and Coke Co.* v. *Mead.* (1) What the Court held in that case was that the history of the previous legislation shewed that the only remedy of the gas company in such a case was to refuse to supply gas to the incoming tenant until the arrears were paid. In the first place it appears to me that there is great difficulty in so holding upon the words of the section itself; for it provides that the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant, if required by him to do so. Regard being had to that provision, the natural meaning appears to me clearly to be that, in a case within the exceptions, the gas company shall, in the absence of such collusion, be bound to supply gas to the incoming tenant on the one hand, but the incoming tenant on the other hand shall be liable for the arrears. Here there is no suggestion of collusion. When the grounds of the decision in *Gas Light and Coke Co.* v. *Mead* (1) are looked at, it will be seen that it rested on the assumption that under the prior Acts the gas company had a right in such a case to cut off the supply of gas. The enactment which gives to the company the right to cut off the supply of gas is s. 16 of the Gasworks Clauses Act, 1847. But the power given by that section is limited to cutting off the supply from the premises of the person to whom the gas was supplied, and who has made default in paying for it. The provisions of the section are not applicable to a case like the present, where, there having been a supply of gas to a person, the premises have ceased to be the premises of that person, and are occupied by another person with an independent title. Both the learned judges in *Gas Light and Coke Co.* v. *Mead* (1) appear to me to rest their decision on the ground that the company had the right to cut off the supply of gas, and on that account their reasoning is less satisfactory than that of Rigby L.J. in *Paterson* v. *Gas Light and Coke Co.* (2) For these reasons I agree that the appeal should be allowed.

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(1) 45 L. J. (M.C.) 71.

(2) [1896] 2 Ch. 476.

MATHEW L.J. In this case the question submitted to us is in substance whether the decision in *Gas Light and Coke Co.* v. *Mead* (1) can be upheld. I think that, when the grounds of that decision are considered, it cannot be treated as a binding authority. The judges who decided it appear to me to have overlooked the fact that, under s. 16 of the Act of 1847, the gas company are prohibited, where arrears have been left unpaid by an outgoing tenant, from cutting off the supply of gas. When we turn to the section here in question, we find that, substantially, with the omission of one of the exceptions contained in it, its provisions are to the same effect as those of s. 39 of the Metropolis Gas Act, 1860, which are in part similar to those of s. 39 of the Gasworks Clauses Act, 1871. Sect. 39 of the Act of 1860 provides that, in case the consumer leaves premises where gas has been supplied to him without paying the rate or meter rent due from him, the gas company shall not "require from" the next tenant payment of the arrears, unless he has agreed with the defaulting consumer to pay them. The words "require from" in that section must mean "insist on payment by" the next tenant. The effect seems to be that the next tenant is in such a case to be placed in the same position as the outgoing tenant. The section goes on to provide that the gas company shall "notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him so to do." The section, therefore, plainly recognises the right of the incoming tenant to have a supply of gas notwithstanding the existence of the arrears. Sect. 18 of the Gas Light and Coke Company's Act, 1872, contains, in addition to the exception mentioned in s. 39 of the Act of 1860, another exception—namely, the case in which the incoming tenant continues to carry on the business carried on by the outgoing tenant upon the premises, having paid a consideration for so doing. The provisions in that case are the same as in the case where the incoming tenant has agreed with the outgoing tenant to pay the arrears, and in that case also the section distinctly provides that the incoming tenant must pay the arrears, though notwithstanding the existence of the arrears, in the absence of collusion between him and the outgoing tenant, the former shall have a right to a supply of gas if he requires it. Independently of authority, the construction of the words of the section itself appears to me to be clear; but we have in addition the observations of Rigby L.J. in *Paterson* v. *Gas Light and Coke Co.* (1), and the statement of Lush J. in *Gas Light and Coke Co.* v. *Mead* (2) as to the construction which he would have placed upon the section, but for what he supposed to be the effect of the earlier legislation.

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(1) 45 L. J. (M.C.) 71.

(2) [1896] 2 Ch. 476.

Appeal allowed.

Solicitors for plaintiffs: *Bedford, Monier-Williams & Robinson.*
Solicitors for defendants: *Boulton, Sons & Sandeman.*

(1) [1896] 2 Ch. 476.

(2) 45 L. J. (M.C.) 71.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 4, 5, 9.

In re AN ARBITRATION BETWEEN TODD, BIRLESTON & CO. AND THE NORTH EASTERN RAILWAY COMPANY.

Mines and Minerals—Clay—Compulsory Purchase—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 20), *ss.* 77, 78, 79.

Clay forming the surface or subsoil, and constituting the "land" compulsorily taken for the purposes of an undertaking, is not a mineral within the meaning of ss. 77, 78, or 79 of the Railways Clauses Consolidation Act, 1845.

Lord Provost of Glasgow v. *Farie*, (1888) 13 App. Cas. 657, explained.

Hext v. *Gill*, (1872) L. R. 7 Ch. 699, and *Jersey* (*Earl*) v. *Neath Guardians*, (1889) 22 Q. B. D. 555, commented on.

Great Western Ry. Co. v. *Blades*, [1901] 2 Ch. 624, approved.

APPEAL from the decision of Wright J.

On May 2, 1900, the North Eastern Railway Company, under and by virtue of the powers conferred upon them by the North Eastern Railway Act, 1897, which incorporated the Railways Clauses Consolidation Act, 1845, served notice to treat upon Todd, Birleston & Co. for the purchase of their interest in certain lands and hereditaments, together with the mines and minerals under the same (except coal, ironstone, and fireclay), in the parish of Chester-le-Street in the county of Durham.

The parties not having agreed as to the amount of compensation to be paid by the company to Todd, Birleston & Co., the determination of the compensation was referred to an arbitrator, who found the facts to be (inter alia) as follows: "(4.) All the land the subject of the arbitration contains immediately under the surface or vegetable soil an extensive bed of clay or common brick-earth. This extends to a considerable depth. It has been proved by borings to extend to a depth of one hundred feet. Clay of the same character exists immediately under the surface over a large area of land in the district. The clay is worked by open work, and not by mining."

(6.) "The company require the land comprised in the notices to treat for the purpose of widening their railway."

The claimants, Todd, Birleston & Co., contended that the clay lying under the land which the company were taking was a mineral within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845, and that the claimants were therefore entitled to dig and take the clay away up to the boundary of the land already belonging to the company; and they further claimed to be paid for all the clay lying under the land comprised in the notice to treat.

The company contended that the clay was not a mineral within the meaning of the Act, and that the company were entitled to have left by the claimants without payment or compensation so much of the clay under the land to be taken as was necessary for lateral support of the railway already constructed.

The arbitrator stated his award in the form of a special case, the question for the opinion of the Court being whether the clay described in paragraph 4 of the case (set out above) was a mineral within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845.

If that question was answered in the affirmative, the arbitrator awarded that the sum of 7018*l.* was the amount to be paid by the company; but if in the negative, he awarded that the sum of 4518*l.* should be paid by the company.

Wright J. answered the question in the negative, and the claimants appealed. (1)

Cyril Dodd, K.C., and *Frank Dodd*, for the appellants. This clay is a mineral under s. 77 of the Railways Clauses

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(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is provided, "And with respect to mines lying under or near the railway, be it enacted as follows: Sect. 77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Consolidation Act. At any rate it is a mineral within s. 78, and the company will get no right to adjacent support from the clay adjoining the land purchased. No doubt in *Lord Provost of Glasgow* v. *Farie* (1) the House of Lords decided that clay forming the surface or subsoil of land was not a mineral within the meaning of a reservation in the Waterworks Clauses Act, which is in similar terms. That case is however distinguishable, for the clay there, being the soil of the place, was absolutely necessary for the construction of the reservoir, and further that was a Scottish case, and, as the Lord Chancellor there pointed out, the decision was confined to the particular Act, and had no bearing on any other statute, or on any grant not controlled by the statute in question, in which the words "mines or minerals" might occur.

[EARL OF HALSBURY L.C. It is true that I did say that, but it was not said by any of the other noble Lords. The judgment is the judgment of the House of Lords, and what an individual member says is not to be taken as an authority. It seems to me that that case discussed all the authorities, and is a decision which is in point and by which we are bound.]

In *Midland Ry. Co.* v. *Robinson* (2) Lord Herschell (who had dissented from the judgment in *Lord Provost of Glasgow* v. *Farie* (1)) and Lord Watson held that mines and minerals under ss. 77 and 78 of the Railways Clauses Act, 1845, included such as were usually worked by open or surface operations. Lord Macnaghten dissented, and adhered to the view he had expressed in the former case.

[EARL OF HALSBURY L.C. Lord Herschell seems to have been of opinion that *Midland Ry. Co.* v. *Robinson* (2) qualified, if it did not overrule, the earlier case of *Lord Provost of Glasgow* v. *Farie* (1); but I cannot agree with that view.]

In *Great Western Ry. Co.* v. *Blades* (3) Buckley J. says that the opinion expressed by Mellish L.J. in *Hext* v. *Gill* (4), that a reservation of minerals includes every substance that can be got from underneath the surface of the earth for the purpose of profit, has not been overruled.

(1) 13 App. Cas. 657.
(2) (1889) 15 App. Cas. 19.
(3) [1901] 2 Ch. 624.
(4) L. R. 7 Ch. 699, at p. 712.

C. A.
1903

TODD, BIRLESTON & CO. AND NORTH EASTERN RAILWAY, *In re.*

[EARL OF HALSBURY L.C. I think that the House of Lords did not adopt that part of Mellish L.J.'s judgment. I think it is absolutely wrong to say that the question whether a thing can be worked at a profit or not is to determine whether it is a mineral or not.]

Great Western Ry. Co. v. *Blades* (1) is contrary to the main current of authority dealing with clay under the Lands Clauses Act. The word "minerals" has a different meaning in ss. 78 and 79 to that in s. 77. A bed of clay has been held to be a mine in *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (2) That is not overruled by *Lord Provost of Glasgow* v. *Farie.* (3) The same was held by Fry J. in *Loosemore* v. *Tiverton and North Devon Ry. Co.* (4), and his view was not dissented from either in the Court of Appeal or the House of Lords (5), where the case went on appeal on another point. There were several other cases before *Lord Provost of Glasgow* v. *Farie* (3) in which clay of a character similar to that in this case was held to be a mineral within the meaning of s. 77 of the Railways Clauses Act, 1845. Since *Lord Provost of Glasgow* v. *Farie* (3) the decision in *Jersey (Earl)* v. *Neath Guardians* (6), following *Hext* v. *Gill* (7), was that mines and minerals included brick-earth and clay: *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (8); *Johnstone* v. *Crompton* (9); *Scott* v. *Midland Ry. Co.* (10)

Neville, K.C., and *A. T. Lawrence, K.C.* (*J. E. Bankes, K.C.*, and *A. R. Butterworth* with them), for the respondents. The respondents are willing that the Court should say whether this clay is a mineral within the meaning of ss. 78 and 79 as well as that of s. 77 of the Railways Clauses Act, 1845. The word "minerals" in the three sections has the same significance. If the meaning of the word "minerals" is more extended in s. 78 than in s. 77, that would give the vendor a right under s. 78 to work minerals which had not been reserved to him under s. 77, which would be absurd. That the same meaning must be given to "minerals" in each of these sections seems to follow from Lord Macnaghten's judgment in *Lord Provost of Glasgow* v. *Farie.* (1) The decision in that case really governs this case.

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(1) [1901] 2 Ch. 624.
(2) (1882) 20 Ch. D. 552.
(3) 13 App. Cas. 657.
(4) (1882) 22 Ch. D. 25.
(5) (1884) 9 App. Cas. 480.
(6) 22 Q. B. D. 555.
(7) L. R. 7 Ch. 699.
(8) [1893] 1 Ch. 427.
(9) [1899] 2 Ch. 190.
(10) [1901] 1 K. B. 317.

[EARL OF HALSBURY L.C. I am a little surprised to find that in *Jersey* (*Earl*) v. *Neath Guardians* (2) two of the Lords Justices rely on the opinion of Lord Herschell in *Lord Provost of Glasgow* v. *Farie* (1) in the face of the fact that Lord Herschell was in the minority in that case. They appear to have treated it as part of the decision in that case that *Hext* v. *Gill* (3) was supported. Bowen L.J. there says that I may have been misreported in what I said in *Lord Provost of Glasgow* v. *Farie.* (1) That is a very familiar mode of getting out of a difficulty; but, as I delivered a written judgment, I do not see how I can have been misreported. He says that *Hext* v. *Gill* (3) is inconsistent with what I there said; and so it is, and I intended what I said to be inconsistent with *Hext* v. *Gill.* (3) In *Hext* v. *Gill* (3) the question whether china clay was a mineral or not was immaterial in regard to the decision. No doubt the learned judges expressed the opinion that it was a mineral, but the decision was that whether it was a mineral or not, inasmuch as on the facts of the case it could not be got out without destroying the surface, the owner who claimed to work it must be restrained.]

Jersey (*Earl*) v. *Neath Guardians* (2) was a case of reservation by deed, and has no application here. It was laid down in *Lord Provost of Glasgow* v. *Farie* (1) that decisions with regard to the meaning of the term "mines and minerals" in grants which have no reference to the Act of Parliament do not give much assistance in deciding what is the meaning of those words in these sections. The only point now before the Court is whether this clay is a mineral within the meaning of these sections, and in that respect no distinction can be drawn between *Lord Provost of Glasgow* v. *Farie* (1) and the present case.

Cyril Dodd, K.C., replied.

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(1) 13 App. Cas. 657.

(2) 22 Q. B. D. 555.

(3) L. R. 7 Ch. 699.

EARL OF HALSBURY L.C. So far as I am concerned, I decline to go beyond the question propounded. That question is very simple, and the answer, I think, is as simple as the question, because it is concluded by authority. I do not think there is the smallest ground for saying that this case is distinguishable from *Lord Provost of Glasgow* v. *Farie* (1) in the House of Lords, and that decision must be binding on all Courts. For that reason I am of opinion that the decision at which Wright J. arrived is right, and I decline to say any more on the subject.

LORD ALVERSTONE C.J. I should like to say a word or two upon this case, because, although I entirely agree with the Lord Chancellor that it is really governed by *Lord Provost of Glasgow* v. *Farie* (1), there are certain matters involved in it which require to be noticed. It is perfectly true that the question in *Lord Provost of Glasgow* v. *Farie* (1) arose as between the vendor and the purchaser of the land—that is to say, the person who was there seeking to take away the clay was the person who had sold the land to the waterworks company; and it was contended at one time that that was the real ground of the decision, and that it was no authority either upon the Railways Clauses Act, 1845, or any Act that was not, so to speak, in the same terms as the document which was assumed to have been entered into in that case. I have always thought that that was wrong. I have always thought that *Lord Provost of Glasgow* v. *Farie* (1) decided that where there had been a sale of land under the Lands Clauses Act, incorporating either the Railways Clauses Act or the Waterworks Clauses Act, if the substance which was attempted to be worked as a mineral was found to be the ordinary surface of the soil, *Lord Provost of Glasgow* v. *Farie* (1) was a distinct decision that that substance was not a mineral for the purpose of any one of those Acts. It was suggested at one time that the case of *Midland Ry. Co.* v. *Robinson* (2) had put a different construction on the decision in *Lord Provost of Glasgow* v. *Farie.* (1) I think that sugges-

(1) 13 App. Cas. 657.

(2) 15 App. Cas. 19.

tion is incorrect, because the judgment of Lord Herschell in *Robinson's Case* (1) proceeded upon the basis that it was admitted in the argument that the substances which were under consideration in that case were minerals within the 77th and 78th sections of the Railways Clauses Act, 1845; and in the same way, when the question came to be discussed in *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (2), for reasons which are perfectly apparent when the report is read, that case also proceeded upon the admission that the clay which was attempted to be worked there was a mineral within the mineral sections of the Railways Clauses Act, 1845, and not surface land, as in the case of *Lord Provost of Glasgow* v. *Farie* (3) Then we come to the *Great Western Ry. Co.* v. *Blades* (4), with which, beyond saying it was inconsistent with *Lord Provost of Glasgow* v. *Farie* (3), Mr. Dodd was not able, very naturally, to deal; and I think, speaking for myself, Buckley J. has given a clear exposition of the effect of the decision in *Farie's Case* (3), which is compendiously stated in the words of the head-note: "Clay forming the surface or subsoil and constituting 'the land' purchased for the purposes of the undertaking is not a 'mineral' within s. 77 of the Railways Clauses Consolidation Act, 1845, as interpreted by *Lord Provost of Glasgow* v. *Farie.*" (3) Therefore, in my opinion, the answer to the question put to us must be as the Lord Chancellor has indicated—that the substance in this case is not a mineral within ss. 77, 78, or 79 of the Railways Clauses Consolidation Act, 1845. I think in this case that no distinction can be pointed out between ss. 77, 78, and 79.

I wish to guard against any suggestion that our answer to the question raised by the case in any way determines the other most difficult questions, which have to be decided as to the rights of the parties with regard to a substance which is not a mineral, and, therefore, which a person may or may not be able to work right up to the margin of his property: these rights to a large extent must depend upon the facts existing in the particular case. It is not to be said that we in any way decide that the case for compensation depends upon the decision of the question that we have just answered.

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(1) 15 App. Cas. 19.
(2) [1893] 1 Ch. 427.
(3) 13 App. Cas. 657.
(4) [1901] 2 Ch. 624.

Sir F. H. Jeune P. I agree with the decision for the reasons which have been given, and I have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Nash, Field & Co., for W. Mark Pybus & Son, Newcastle-on-Tyne.*

Solicitor for respondent: *A. Kaye Butterworth, York.*

A. P. P. K.

C. A.
1903
March 3.

[IN THE COURT OF APPEAL.]

WREN *v.* HOLT.

Sale of Goods—Warranty—Beer sold by Retail—Fitness for Consumption—Implied Warranty — Breach — Damages — Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.

By s. 14, sub-s. 2, of the Sale of Goods Act, 1893, "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The defendant kept a beerhouse in which the beer supplied to customers, for consumption on the premises, was that of a particular firm of brewers only. This fact was known to the plaintiff, who frequented the beerhouse for the purpose of buying the beer of that firm. The beer contained arsenic, by reason of which the health of the plaintiff was injured. In an action to recover damages for breach of warranty:—

Held, that the beer had been bought by description within the meaning of s. 14, sub-s. 2, of the Sale of Goods Act, 1893, and that, as examination by the buyer would not have revealed the defect, the defendant was liable on an implied warranty that the beer was of a merchantable quality.

Appeal from a judgment of Wills J. on the findings of a jury.

The action was brought to recover damages for breach of warranty in respect of beer bought by the plaintiff in the beerhouse of the defendant and consumed on the premises. The house was a tied house, and the only beer supplied was that of Messrs. Holden & Co., Limited. The plaintiff was aware of this fact, and in his evidence he said that when he went to the defendant's house he expected to get Holden's beer and nothing else, and that he went there because he preferred Holden's beer to that of any one else. The allegation of the plaintiff was that the beer contained arsenic, and that he had suffered from arsenical poisoning. Upon this point the jury, in answer to a question by the learned judge, said, "We are satisfied that the plaintiff's illness was caused to a large extent by arsenical poisoning due to the defendant's beer, and was contributed to exceedingly by excessive drinking"; and they assessed the damages at 50*l.* A further question was submitted to the jury, "Whether the plaintiff relied for the good quality of his beer on the skill or judgment of the defendant"; and this question the jury finally answered in the negative.

Judgment was entered for the plaintiff.

The defendant appealed.

E. Sutton, for the defendant. At common law there is no general rule that on the sale of an article of food there is an implied warranty that it should be fit for consumption, except, perhaps, in the case of victuallers, butchers, and other dealers in victuals: *Burnby* v. *Bollett*. (1) Every case must depend on its own circumstances. This is shewn by *Emmerton* v. *Mathews* (2), which was the case of a meat salesman, who was held not to be liable for a latent defect in a carcase exposed for sale. *Smith* v. *Baker* (3) was a similar case. Lopes J. there said: "It appears to me that the well understood rule of law, that where a specific article is sold, in the absence of fraud, where the purchaser has an opportunity of inspection, and the seller is not the manufacturer, the maxim 'Caveat emptor' applies." In this case the circumstances negative a warranty, for the presence of arsenic in the beer could not be discovered except by an expert making an analysis expressly directed to the point.

(1) (1847) 16 M. & W. 644; 17 L. J. (Ex.) 190.

(2) (1862) 7 H. & N. 586; 31 L. J. (Ex.) 139.

(3) (1878) 40 L. T. 261.

As to the position under the Sale of Goods Act, 1893, on the finding of the jury the case cannot come within sub-s. 1 of s. 14. No other finding was possible, for the plaintiff stated that he knew the defendant's beerhouse was tied to Holden's Brewery, and that he went there for his beer because he preferred Holden's beer to any other, and, further, the defendant sold the beer as he received it from the brewery, and could exercise skill and judgment only as to plain defects, and not as to defects that could not be discovered without analysis by a chemist.

With regard to sub-s. 2, the expression "bought by description" is not applicable to a sale of beer to a purchaser over a counter and for immediate consumption by him. If there was any description it was only that the beer sold was brewed at Holden's brewery, and was sold as received from the brewery, and that was a true description in every respect. Even if the case could be held to fall within the sub-section, the defendant would only be liable for the difference between the value of the unmerchantable article sold and the price paid for it, and not for the consequential damages which the plaintiff seeks to recover.

The learned judge seems to have relied on *Beer* v. *Walker* (1); but that case is distinguishable, for, as is pointed out by Grove J. in *Smith* v. *Baker* (2), the point before the Court for decision was whether the implied warranty was one which applied to the time when the goods were delivered at the station at the commencement of their conveyance, or whether it applied to the time when the goods arrived at the end of the journey.

Bailhache, for the plaintiff. If this were not a tied house the plaintiff would clearly be entitled to recover, and the point in the case really is whether in the case of a tied house there is such an immunity as is claimed. Under the old law there was an absolute liability on the part of a victualler who sold an unsound article, and it was based either on the ground of warranty or on that put by Lord Coke, and quoted without objection in the judgment in *Burnby* v. *Bollett* (3), that it is a common nuisance to sell food detrimental to the public.

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(1) (1877) 46 L. J. (Q.B.) 677.

(2) 40 L. T. 261.

(3) 16 M. & W. 644; 17 L. J. (Ex.) 190.

With regard to s. 61, sub-s. 2, which preserves common law rights, there is nothing inconsistent with the common law in the provision of s. 14 of the statute, unless some special meaning is to be attached to the words "skill and judgment."

The judge was wrong in telling the jury that they could only reasonably give an answer to the second question in the negative. It may well be that a man may want a particular beer, but prefer to get it of a man on whose judgment he relies. As to sub-s. 2, when a glass of beer is asked for the request is to be supplied with an article of an ascertained kind and description, and the customer is entitled to a sound article. The shopkeeper is protected against liability for patent defects that can be ascertained by inspection, but not in respect of latent defects. The effect of the Sale of Goods Act, 1893, is to alter the pre-existing law in that respect. The judgment may also be supported on the ground that the sale of this beer was an offence under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, and, as a statutory offence was committed, consequential damages can be recovered.

E. Sutton, in reply. It is true that the defendant might have been liable under the last-mentioned Act to a fine: *Goulder* v. *Rook* (1); but no further obligation or liability is imposed by that statute, which was passed in the interests of the public at large, and not in the interests of a particular class of persons, and gave no right of action for breach of the statutory duty: *Atkinson* v. *Newcastle Waterworks Co.* (2)

VAUGHAN WILLIAMS L.J. In this case judgment was entered for the plaintiff, and the question is whether the learned judge was right in so entering judgment upon the findings of the jury. In my opinion he was right; but the case is one that requires careful consideration, and it is not easy to deal with. The difficulty arises which must always exist when an attempt is made to enact an exhaustive code of any branch of our law. However able the codifier may be,

(1) [1901] 2 K. B. 290.

(2) (1877) 2 Ex. D. 441.

when the code comes to be applied to some of the innumerable cases that must arise, there is found every now and then some case which it is impossible to suppose was in fact intended to be governed by the code. At the same time the code purports to be exhaustive, and, therefore, it is necessary to try to treat every case as falling within it. The particular part of the Sale of Goods Act, 1893, with which we have to do is s. 14. By that section, "subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows." Primâ facie, therefore, in order to find a warranty of quality, it is necessary to find a case within the exceptions which set out the circumstances in which a warranty of goods may be implied. By sub-s. 1, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose." It seems to me to be very difficult in the present case to find any warranty within the terms of that sub-section because of the finding of the jury, at which they reluctantly arrived, that the plaintiff did not buy the beer relying on the skill or judgment of the defendant. One easy way out of the difficulty would be to say that there was no evidence on which the jury could properly arrive at that conclusion. Speaking for myself, I am not prepared to say that, and so long as the finding stands it is impossible to find that there was a warranty within sub-s. 1. The warranty, if there is one, must be found elsewhere.

Sub-s. 2 is: "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." Speaking candidly, I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words "by description" as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this sub-section. But in this case we have to consider the findings of the jury. They departed from their first finding, that the customer did rely on the skill or judgment of the seller, and adopted the suggestion of the learned judge that the plaintiff went to this beerhouse in which Holden's beer was kept for the purpose of sale, and asked to be supplied with beer of that description. The reason of the jury for ultimately saying that the plaintiff did not rely on the skill or judgment of the defendant was that the plaintiff was asking for beer of a specific description. Under these circumstances, and in this particular case, though the sale was one of beer in a beerhouse, if the finding of the jury is accepted there was a sale by description. If so, there was an implied warranty under sub-s. 2 that the goods should be of a merchantable quality. This beer, by reason of the presence in it of arsenic, was not of a merchantable quality.

I have only one further remark to make, and that arises on a suggestion that the effect of s. 14 of the Act is to invert the rules of law which were applicable before the Act, and to apply to latent defects the rule formerly applicable to patent defects, and to apply to patent defects the rule formerly applicable to latent defects. It is not necessary to decide this point, but I think if the sub-sections are considered it will be found that no such alteration of the law has been made. I think, therefore, that the judgment must be supported, and the appeal consequently dismissed.

STIRLING L.J. I am of the same opinion. The jury by their finding negatived the proposition that the plaintiff relied on the skill or judgment of the defendant, and that being so no warranty can be implied under sub-s. 1 of s. 14 of the Act. I agree with what my Lord has said as to sub-s. 2. That sub-section applies to cases where the seller, whether he be the manufacturer or not, deals in goods of the description asked for, but provides that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed. In the case before us, though there was an opportunity for inspection, the defect could not be discovered by inspection. The plaintiff was in the habit of going to the house because there he could get Holden's beer, and, upon the facts found by the jury, he in substance bought by that description. That being the case, the seller under sub-s. 2 warranted the merchantable quality of the goods purchased, and is liable to the plaintiff in damages for breach of that warranty.

MATHEW L.J. I am of the same opinion. By s. 61, sub-s. 2, of the Act, the rules of the common law are to continue to apply to contracts for the sale of goods, save in so far as they are inconsistent with the express provisions of the Act. It is not necessary to have recourse to this enactment, or to consider what the rights of the plaintiff would be at common law. The section that we are concerned with is s. 14. This case, in view of the finding of the jury that the plaintiff did not rely on the skill or judgment of the seller, cannot be brought within sub-s. 1, but in my judgment it comes within the plain words of sub-s. 2. The purchase by the plaintiff was of goods bought by description from a seller who dealt in goods of that description, and it was an implied condition that the goods should be of merchantable quality. The case does not come within the proviso, for the defect was not one that examination could reveal. It is not, to my mind, any answer to the case set up by the plaintiff that the goods were bought across the counter. I agree, therefore, that the verdict for the plaintiff ought to stand.

Appeal dismissed.

Solicitor for plaintiff: *H. A. Sims, for J. W. Shaw, Blackburn.*

Solicitors for defendant: *Woodcock, Ryland & Parker, for Hindle & Son, Darwen.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1903
March 14.

ATTORNEY-GENERAL *v.* JOHNSON.

Revenue—Estate Duty—Succession Duty—Gift to a Charitable Society—Reservation of Annuity to Donor—Bonâ fide Purchase—Partial Consideration—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 3, *sub-s.* 2 *—Succession Duty Act,* 1853 (16 *&* 17 *Vict. c.* 51), *s.* 7.

In 1889 500*l.* was paid to the directors of an unincorporated charitable society, in lieu of a legacy, and upon the terms of a resolution of the directors of the society that the trustees of the society should be authorized to pay to the person from whom the 500*l.* was received, and to his wife if she survived him, an annuity of 25*l.* The annuity was not charged upon or secured by the property of the society, and was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity in the year 1889 was 210*l.* The payer of the 500*l.* and his wife, who survived him, died after the date of the Finance Act, 1894. The Crown claimed that on his death estate duty became payable by the society on the 500*l.* under s. 2, sub-s. 1 (*c*), of the Act; and that on her death succession duty became payable on the 500*l.* under s. 7 of the Succession Duty Act, 1853:—

Held, that the transaction was a gift and not a bonâ fide purchase of an annuity, and that consequently estate duty was payable on the full sum of 500*l.*, without any deduction in respect of the value of the annuity:

Held, also, that, the disposition of the 500*l.* not being a bonâ fide sale, succession duty was payable under s. 7 of the Succession Duty Act, 1853.

Judgment of Phillimore J., [1902] 1 K. B. 416, reversed.

Appeal from the judgment of Phillimore J., reported [1902] 1 K. B. 416.

The case arose on an information by the Attorney-General claiming estate duty upon the death of C. M. Burton, and succession duty upon the death of Martha Burton, on property in respect of which C. M. Burton had made a disposition in favour of the London Missionary Society. The defendant was the secretary of the society, who for the purpose of ascertaining the liability of the society was, by agreement, to be deemed to represent the society.

The facts as disclosed by the information and by the answer of the defendant were in substance as follows: The London

Missionary Society is a body of persons, not incorporated, but associated for certain charitable purposes of a religious character and possessed of considerable invested funds, which are held by trustees appointed by the society, and are dealt with and disposed of by directors in whom the management of the affairs of the society is from time to time vested. In 1889 the society received from C. M. Burton, a director of the society, a sum of 500*l.*, and arranged to pay an annuity of 25*l.* per annum to Burton during his life, and after his death to his wife Martha Burton during her life, if she survived him.

This arrangement was recorded in the following resolution of the directors of the society: "That in consideration of the payment to the London Missionary Society of 500*l.* in lieu of a legacy by a director (Charles Munday Burton, Esq.), who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of 25*l.* per annum in quarterly payments (the first payment to be made in months after the receipt of such capital sum) during the life of the said Charles Munday Burton, Esq., and a like payment to his present wife Mrs. Martha Burton during her life, should she survive him."

Previously to the passing of this resolution there had been correspondence between Burton and the society, which is set out in the judgment in the Court below. The funds of the society were not charged with the payment of the annual sum of 25*l.*, but it was paid by the directors as one of the ordinary outgoings of the society. Burton died on May 12, 1895, and Martha Burton died on May 5, 1900.

The actual commercial value of the annuity of 25*l.*, having regard to the respective ages of Burton and his wife in 1889, was 210*l.*

The information claimed that upon the death of Burton estate duty became payable by the society and its trustees under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), incorporating s. 38, sub-ss. 1 and 2, of the Customs and Inland Revenue Act, 1881, and s. 11, sub-s. 1, of the Customs and Inland

Revenue Act, 1889 (1), on the said sum of 500*l.*, being a gift to the society of which bonâ fide possession and enjoyment was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise; that upon the death of Mrs. Burton succession duty at the rate of 11½ per cent. became payable by the society and its trustees on the said sum of 500*l.* in respect of the determination of the payment of 25*l.* per annum to Mrs. Burton, under s. 7 of the Succession Duty Act, 1853 (2), and s. 21 of the Customs and Inland Revenue Act, 1888; but at the hearing it was admitted on behalf of the Crown that the succession duty, if payable, would be at the rate of 10 per cent.

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(1) By the Finance Act, 1894, s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include. . . ."

"(*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, "The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after June 1, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased."

By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, "Sub-s. 2, of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—

"The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

(2) By the Succession Duty Act, 1853, s. 7, "Where any disposition of property, not being a bonâ fide sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any time of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit

The learned judge held (1) that estate duty was payable, but that under s. 3, sub-s. 2, of the Finance Act, 1894 (2) the value of the consideration for the annuity, namely, 210*l.*, must be deducted from the value of the property for the purpose of estate duty, which was, therefore, only payable on 290*l.*, and, further, that no succession duty was payable, the transaction being a bonâ fide sale, and, therefore, not within s. 7 of the Succession Duty Act, 1853.

The Attorney-General appealed on both points.

1903. Feb. 11. *Sir R. B. Finlay, A.-G.*, and *Sir E. H. Carson, S.-G.* (with them *Vaughan Hawkins*), in support of the appeal. On the facts of this case the handing over of 500*l.* to the society was a gift with a reservation to the donor, and was not the purchase of an annuity. Bonâ fide possession and enjoyment of the gift were not retained by the society to the entire exclusion of the donor, and of any benefit to him by contract or otherwise: Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1; and consequently estate duty is payable under the Finance Act, 1894, s. 2, sub-s. 1 (*c*). The case does not fall within s. 3 of the Finance Act, 1894, for to come under the

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so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

(1) [1902] 1 K. B. 416.

(2) The Finance Act, 1894, s. 3: "(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

"(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

exceptions from taxation in that section there must be a sale. The consideration mentioned in that section is not supplied by a reservation within s. 2, sub-s. 1 (*c*), for something reserved out of a gift cannot be treated as if it formed a consideration for the gift.

As to succession duty on the death of the wife, s. 7 of the Succession Duty Act, 1853, applies unless there has been a bonâ fide sale. That could only be if the society acquired a succession of the value of the annuity granted, for a bonâ fide sale must be one for full value. The answer to the judgment of the learned judge on this point is that the transaction between the parties was not a sale.

[They cited *Attorney-General* v. *Worrall* (1) and *Lord Advocate* v. *M'Kersies.* (2)]

Micklem, K.C., and *Harman*, for the defendant. The intention was to make a charitable gift to the society, but not to the extent of 500*l*. The ultimate benefit to the society was the difference between the amount they received and the amount that they had to pay—that is, the value of the annuity for the joint lives of the husband and wife. The case is not that of a gift with a reservation, but of a combination of gift and purchase, and the money paid over was depleted year by year to meet the annuity. The true construction of s. 11 of the Customs and Inland Revenue Act, 1889, is that only so much of the property that passes as is a gift is the subject of taxation. *Attorney-General* v. *Worrall* (1) arose before the Finance Act, 1894, and was a case of the reservation of a life interest, which stands on a different footing from the case of property which is subject to reduction to meet a yearly charge. It is submitted that the learned judge rightly decided that this case came within s. 3, sub-s. 2, of the Finance Act, 1894. As to succession duty, s. 7 of the Succession Duty Act, 1853, does not apply. There was a bonâ fide sale, and it is not necessary that it should have been for full consideration. There was no succession by the society to any property on the death of the wife: *Fryer* v. *Morland* (3); and the language of the section is inapplicable to the purchase of an annuity accompanied by a gift. The construction placed on the section on behalf of the Crown would lead to the result that the greater the benefit that is reserved on the disposition of the property, the higher would be the succession duty when the benefit is determined. It cannot have been the intention of the Legislature that a result might be arrived at which might make "increase of beneficial interest" in a property exceed the value of the property. At any rate, if the Act can apply to this case, it can only do so as to the 290*l.*, which was the actual beneficial interest taken by the society.

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(1) [1895] 1 Q. B. 99.

(2) (1881) 19 Sc. L. R. 438.

(3) (1876) 3 Ch. D. 675.

Sir R. B. Finlay, A.-G., in reply. The argument put forward for the defendant is much the same as that which was put forward in *Grey (Earl)* v. *Attorney-General* (1) and dealt with in the opinion of the Chancellor. As to the succession duty, the suggested anomaly does not arise, for the view taken is that the statute points to an increase of beneficial interest in the property, and cannot include anything beyond the value of the property itself.

Cur. adv. vult.

March 14. The judgment of the Court (Vaughan Williams, Stirling, and Mathew L.JJ.) was read by

VAUGHAN WILLIAMS L.J. In 1889 Mr. C. M. Burton, a director of the London Missionary Society, paid to that society a sum of 500*l.* upon the terms stated in a resolution of the directors, which is as follows: "That in consideration of the payment to the London Missionary Society of 500*l.* in lieu of a legacy by a director (Charles Munday Burton, Esq.), who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of 25*l.* per annum in quarterly payments . . . . during the life of the said Charles Munday Burton, Esq., and a like payment to his present wife Mrs. Martha Burton during her life, should she survive him." It was admitted by the Attorney-General that the payment was made in pursuance of a binding legal contract; and the case was argued, and it is to be decided, on that footing. Mr. Burton died on May 12, 1895; Mrs. Burton on May 5, 1900; and the annual sum of 25*l.* mentioned in the resolution was regularly paid, out of the funds of the society, first to Mr. Burton during his life, and afterwards to Mrs. Burton during hers.

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(1) [1900] A. C. 124.

The Attorney-General on behalf of the Crown claimed that estate duty became payable on the death of Burton under the Finance Act, 1894, s. 2, sub-s. 1 (*c*); and, further, that succession duty became payable upon the death of Mrs. Burton under the Succession Duty Act, 1853, s. 7.

Phillimore J. has held that estate duty was payable, but that under s. 3, sub-s. 2, of the Finance Act, 1894, the value in 1889 of an annuity of 25*l.* for the lives of Mr. and Mrs. Burton and the life of the survivor of them (which value was admitted to be 210*l.*) was to be deducted, and consequently estate duty was only payable on 290*l.* The learned judge further held that no succession duty was payable. From this decision the Attorney-General has appealed.

Sect. 2, sub-s. 1, of the Finance Act, 1894, provides that "property passing on the death of the deceased shall be deemed to include" (amongst other property) "(*c*) property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

Amongst the property required by s. 11 of the Customs and Inland Revenue Act, 1889, to be included in an account is "property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." In *Crossman* v. *Reg.* (1), a case decided with reference to s. 38 of

(1) (1886) 18 Q. B. D. 256, at p. 262.

the Customs and Inland Revenue Act, 1881, Hawkins J. in delivering the judgment of a Divisional Court (consisting of Denman J. and himself), says: "In considering the question whether a settlement is voluntary or not according to the true construction of the Customs and Inland Revenue Act, 1881, we think it is incumbent upon us to look at the real substance of the transaction and its object; and if so looking at it we come to the conclusion that in its origin it was intended to be a free gift to the transferees, but only upon the condition that the settlor should substantially retain to himself the interest in the property for his life, we ought to find the settlement to be voluntary within the meaning of the Act, even though on the face of the deed, and in fact, we may find that there was sufficient consideration to support a contract between the parties, and to take it out of the operation of the statute of 27 Eliz. as regards a subsequent purchaser." In *Attorney-General* v. *Worrall* (1), decided on s. 11 of the Customs and Inland Revenue Act, 1889, this view was in substance adopted by the Court of Appeal. It was there held that an assignment of a mortgage debt of 23,924*l.* by a father to his son was a "gift" within the meaning of the enactment, although it purported to be made in consideration of a covenant by the son to pay to the father during his life the yearly sum of 735*l.*

Having regard to the terms of s. 11 of the Customs and Inland Revenue Act, 1889, which speaks of a benefit to the donor by contract, and to the language of the Finance Act, 1894, s. 2, sub-s. 1 (*c*), which incorporates the provisions of s. 11 of the Customs and Inland Revenue Act, 1889, as if the words "voluntary" and "voluntarily" and "volunteer" were omitted, and to the decisions in *Crossman* v. *Reg.* (2) and *Attorney-General* v. *Worrall* (1), we come to the conclusion that the Legislature intends that property shall be treated as taken under a "gift," although such gift may have been made under a contract by which the donor takes a benefit.

If, then, the substance of the transaction between Mr. Burton and the Missionary Society be looked at, it seems to us that

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(1) [1895] 1 Q. B. 99.

(2) 18 Q. B. D. 256.

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it was intended not to be a matter of pure business, but one of bounty on the part of Mr. Burton. The facts that the payment was made "in lieu of a legacy," and that the amount paid largely exceeded the market value of the annuities agreed to be paid to Mr. and Mrs. Burton are sufficient to establish this. Consequently, the transaction must, in our opinion, be held to be a gift within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. In truth this was not seriously disputed by the learned counsel for the Missionary Society, who urged that the gift ought not to be treated as consisting of 500*l.*, but of that amount less the deduction of 210*l.* This contention was based partly on the language of the Customs and Inland Revenue Act, 1898, s. 11, sub-s. 1, and partly on the terms of s. 3 of the Finance Act, 1894.

As to the first of these grounds, it is to be observed that by the terms of the Finance Act, 1894, property passing on the death of the deceased is to be deemed to include the property in question as being property which would be required "on the death of the deceased" to be included in an account. The point of time to which regard must be paid is that of the death of the deceased—in this case Mr. Burton. If at that moment the 500*l.* had remained in the hands of the society undiminished, then (subject to any question arising as to the effect of the annuity which was to be paid to Mrs. Burton) it would seem that the whole sum must be taken to have passed and to be subject to estate duty. This is in accordance with the decisions in *Attorney-General* v. *Worrall* (1), where no deduction was allowed in respect of the yearly sum of 735*l.* covenanted to be paid by the donee to the donor during his life, and *Attorney-General* v. *Grey* (*Earl*) (2), where no deduction was made in respect of an annual rent charge reserved to the donor during his life.

What the society actually did with the 500*l.* does not appear; but it is contended that they ought not to be treated as having the whole of that sum in their hands at Mr. Burton's death, because no investment of that sum, proper to be made by trustees, would at the present time yield 25*l.* (that is,

(1) [1895] 1 Q. B. 99.

(2) [1898] 2 Q. B. 534; [1900] A. C. 124.

5 per cent. on 500*l*.) per annum; and consequently that, for the purpose of paying the annuity, the capital originally placed in their hands must be treated as having been encroached upon to a certain extent. We do not think that this contention ought to prevail, for, if one looks at the real substance of the transaction and its object, it is difficult to avoid the conclusion that it was intended to be a testamentary gift of 500*l*.

Suppose the transaction in this case had been that, in consideration or upon the condition of the society paying to the donor the interest on 500*l*. for his life, he would make a present gift of 500*l*. It seems to us that such a case would clearly have fallen within the operation of s. 11 of the Act of 1889. Now what is the difference between that case and the present? It seems to me that, instead of the consideration being the interest on 500*l*., it is an arbitrary annuity of 25*l*. for the lives of the donor and his wife, and it is said that interest at this rate could not be obtained on an investment of trust moneys, which we assume to be true. This difference does not in our judgment convert the transaction into a purchase of an annuity. A consideration is given whether the promise is to pay interest at the rate obtainable on trust investments, or to grant an annuity exceeding that rate, and in either case the substance of the transaction is a testamentary gift. The donor gives the 500*l*., less the profits to be made thereout, until his death and that of his wife. The fact that, by the condition of the gift which the transferee accepts, the rate of profit is fixed above the rate of interest which might be reasonably expected upon a trust investment does not seem to us to divest the transaction of its character as a gift, nor does the fact that the gift is subject to a life interest at the fixed rate in favour of the wife. The corpus of the gift is in no way encroached upon. It seems to us that to hold the contrary would be to disregard the decision in *Attorney-General* v. *Worrall* (1), for we do not think that consistently with that case one can take into account the quantum of the profits of the subject-matter of the gift which are retained by the donor. The profit retained in respect of the 500*l*. presently paid may of course be so large that one cannot regard the 500*l.* as a gift, and must regard that which is retained or reserved as an annuity for two lives purchased at the price of 500*l.* But then there would be no gift, and only a sale, and the section would have no application. But that does not seem to be the case here.

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(1) [1895] 1 Q. B. 99.

It remains to consider if the incorporation of s. 11 of the Act of 1889, somewhat modified, into the Finance Act makes any difference. Is that which would have been payable as account duty under the Act of 1889 not payable as estate duty under the Finance Act? We do not think that the Finance Act in this respect alters the account duty. Property passing on the death of the deceased is, by virtue of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, to include property which would be required on the death of the deceased to be included in an account under s. 38 of the Act of 1881 as amended by s. 11 of the Act of 1889, and really the only question, as pointed out by Phillimore J., is—whether the transaction in this case amounts to the purchase of an annuity, and is therefore exempt from estate duty under the provisions of s. 3, sub-s. 1, of the Finance Act, 1894, or to the grant of an annuity "for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit," so that the value of the consideration ought to be allowed as a deduction from the value of the property for the purpose of estate duty under sub-s. 2 of s. 3. Phillimore J. has held that the whole 500*l.* is, in the first instance, taxable—a conclusion in which we agree—but has further held that in this case 210*l.*, the value of an annuity of 25*l.* a year for two lives, ought to be deducted from the 500*l.*, and that therefore only 290*l.* remains to be taxed. This is a conclusion in which we cannot agree, because, in our judgment, this is not a case of a bonâ fide purchase of an annuity at all. It is a case of a testamentary gift effected by the machinery of a present donation, subject to a reservation of something intended to be the equivalent of a life interest in the subject-matter of the donation.

The conclusions at which we have arrived really dispose also of the question raised under s. 7 of the Succession Duty Act,

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1853, and dispose of that question in favour of the Crown. The case, we agree with Phillimore J., comes within s. 7, unless it is excepted therefrom as being a disposition of property by bonâ fide sale; but, for reasons which we have already given, we think that the case is not one of bonâ fide sale.

We think that this appeal ought to be allowed, and judgment on all points entered for the Crown.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Leonard & Pilditch.*

A. M.

C. A.
1903
March 13.

[IN THE COURT OF APPEAL.]

In re BEER.
Ex parte BEER.

Bankruptcy—Annulment—Discretion of Court—Conduct of Bankrupt—Interests of Public and of Commercial Morality—Proposal of Composition after Discharge of Bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 23, 32—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 9.

The creditors of a bankrupt, whose discharge had been suspended for two and a half years, after the period of suspension had expired resolved by the proper majority to entertain, under the provisions of s. 23 of the Bankruptcy Act, 1883, a proposal by the bankrupt to pay a composition of 7*s.* 11*d.* in the pound in addition to a dividend of 2*s.* 1*d.* in the pound which had been paid in the bankruptcy, on condition that the bankruptcy should be annulled:—

Held, that, in the exercise of its discretion under s. 23 as to the approval of the scheme, the Court ought to consider, not only the interest of the creditors, but also the interests of the public and of commercial morality, and that, having regard to the facts found by the official receiver in his report on the bankrupt's application for his discharge, the bankruptcy ought not to be annulled.

The Court accordingly refused to approve of the scheme.

APPEAL by G. J. Beer, who had been adjudicated a bankrupt, from the refusal of one of the registrars to approve of a proposal of a composition under s. 23 of the Bankruptcy Act, 1883. Beer had carried on business as a whisky blender. A receiving order was made against him on April 10, 1899, and he was adjudicated a bankrupt on April 27. He subsequently applied for an order of discharge. The official receiver in his report stated that the bankrupt's assets were not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities; that he had continued to trade after knowing himself to be insolvent; and that he had been guilty of misconduct in having appropriated and used for the purposes of his own business moneys belonging to and received by him on account of his wife without her knowledge or consent. The registrar ordered that the discharge should be suspended for two years and six months, and that the debtor should be discharged as from January 12, 1902.

In the course of the bankruptcy proceedings dividends amounting to 2*s.* 1*d.* in the pound were paid on the unsecured debts of the bankrupt, which amounted to 5877*l.* 17*s.* 6*d*, including proofs for 3742*l.* 2*s.* 11*d.* and 953*l.* 0*s.* 2*d.* by the bankrupt's wife. The proposal which the Court was asked to approve was accepted at a meeting of creditors held on January 9, 1903, by a majority in number representing three-fourths in value. It provided for the deposit with the official receiver of a sufficient sum of money for the payment of a composition of 7*s.* 11*d.* in the pound (making in all 10*s.* in the pound) to the creditors other than the debtor's wife, who had withdrawn her claim against the estate, and had executed a release of it under seal. The proposal was made upon condition that the bankruptcy should be annulled.

The official receiver reported in favour of the scheme. One creditor appeared to oppose it.

The registrar's order stated that " the Court, being of opinion that s. 23 of the Bankruptcy Act, 1883, does not provide for the approval by the Court of a scheme of composition brought in after the expiry of an order suspending the bankrupt's discharge, such order not having been rescinded, and being further of opinion that the clause in the resolution of creditors accepting the debtor's condition providing for the annulment of the bankruptcy is ultra vires, this Court doth refuse to approve of the said proposal for a composition."

The order of discharge was made without the certificate mentioned in s. 32 (1) of the Bankruptcy Act, 1883. The bankrupt had been elected a councillor for the borough of Ealing; and he desired to have his bankruptcy annulled in order to remove his statutory disqualification for holding that office.

The bankrupt appealed.

Muir Mackenzie, for the bankrupt. Sect. 23, sub-s. 1, enables the creditors to entertain a proposal for a composition "at any time" after the adjudication, and this applies after the discharge has been granted. The "creditors" means those persons who are at the time entitled, and those who may afterwards become entitled, to prove and to receive dividends in the bankruptcy. The scheme in the present case contained nothing more than what is mentioned in sect. 23. The provision that the bankruptcy should be annulled was mere surplusage; if the scheme were approved, the Court would, under sub-s. 2, annul the bankruptcy. Of course the discretion of the Court could not be fettered.

(1) By s. 23 of the Bankruptcy Act, 1883, "(1.) Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication.

"(2.) If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare."

By s. 32, "(1.) Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for (inter alia)—

"(*d*) Being elected to or holding or exercising the office of mayor, alderman, or councillor.

"(2.) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when (*a*) the adjudication of bankruptcy against him is annulled; or (*b*) he obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part."

By the Bankruptcy Act, 1890, s. 9, "No disqualification arising by virtue of s. 32 of the principal Act shall exceed a period of five years from the date of any discharge which may have been, or may hereafter be, granted under and by virtue of the principal Act, or of this Act."

[Romer L.J. The Court would have to consider what kind of a bankruptcy it was. If the bankrupt had been guilty of fraudulent conduct, I should be unwilling to annul the adjudication even if he paid his creditors in full.]

In the present case the discharge was suspended for only six months more than the two years for which it was necessarily suspended under s. 8 of the Bankruptcy Act, 1890, on the ground that the bankrupt's assets did not amount to 10*s.* in the pound, and that he had continued to trade after knowing himself to be insolvent. The registrar could not, therefore, have considered that his conduct was very reprehensible in other respects. The official receiver did not report that the bankrupt had been guilty of any fraud or fraudulent breach of trust, and the official receiver has reported in favour of the scheme.

[Collins M.R. *In re Burr* (1) shews that the Court is justified in having regard to the conduct of a debtor upon an application for the approval of a scheme and the rescission of the receiving order.]

That was a very different case from the present case. There Fry L.J. spoke of the debtor as "one of those plagues of society of whom there are too many." The registrar has not exercised any discretion on the ground of the bankrupt's conduct, nor did the official receiver report any facts which would raise any question of discretion. The bankrupt's conduct was dealt with upon the application for his discharge, and he was punished by the suspension of his discharge for two and a half years.

[Romer L.J. referred to *Ex parte Kearsley*. (2)]

Danckwerts, K.C., and *Carrington*, for the creditors who supported the bankrupt's application. *Ex parte Reed & Bowen* (3) shews that the creditors have a locus standi to be heard. No doubt the matter is one for the exercise of the judicial discretion of the Court. There are many material things to be taken into consideration. The position is very different from that upon an application for an order of

(1) [1892] 2 Q. B. 467.
(2) (1886) 18 Q. B. D. 168.
(3) (1886) 17 Q. B. D. 244.

discharge. There are various degrees of culpability. The registrar who refused to approve this scheme is the same registrar who made the order suspending the discharge, when he made a very small addition to the minimum period of suspension. The bankrupt must then have satisfied the registrar that he had not been very culpable in making use of his wife's money. He has suffered punishment for his offence. The only further punishment will be disqualification for a time from holding certain public offices. The interest of the creditors should be considered. If this composition is not approved, the creditors will get nothing more than the dividend of 2*s.* 1*d.* in the pound. The real question is whether the Court ought to punish the creditors in order to inflict some inconvenience upon the debtor. Is it worth while to do this in order to keep him out of certain public offices for a few years longer? The wife by releasing her debt has shewn what she thinks of the matter. By approving this scheme no stigma will be removed from the bankrupt.

Herbert Reed, K.C., and *E. Clayton*, for the opposing creditor, were not called upon.

Collins M.R. The bankrupt asks the Court to approve of a proposal made by him, one of the conditions of which was that the bankruptcy should be annulled. The registrar was of opinion that there could not be an annulment except upon the terms mentioned in s. 35 of the Bankruptcy Act, 1883, namely, "where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full." That section does no doubt afford an indication of the view of the Legislature. The Court may have power to annul a bankruptcy under other circumstances, but they must be very special circumstances. This bankrupt is obliged to admit that he has been guilty of conduct which is open to grave reprehension. The official receiver has reported, and the registrar gave effect to that report by suspending the order of discharge, that the bankrupt had improperly employed money belonging to and received by him on account of his wife. He had in that way committed one of the offences mentioned in s. 8 of the Bankruptcy Act, 1890. The granting of the bankrupt's application for the approval of the composition is a matter entirely within the discretion of the Court. He is asking for an indulgence, and he is bound to shew some good reason why the indulgence should be granted. It is the duty of the Court to consider the character of the bankrupt and how it was that he had come to the ordeal of bankruptcy. Mr. Danckwerts contended that the matter should be regarded rather in the light of the interest of the creditors than in that of the interest of the public. No doubt the creditors are entitled to consideration, and it would be pleasant to them to receive 10*s*. in the pound upon their debts. But the matter cannot be decided without taking into consideration the conduct of the debtor. In *In re Taylor* (1) it was held that, even where the creditors had been paid in full, the Court had a discretion to refuse to annul the bankruptcy, if having regard to the conduct of the bankrupt it was right to do so. It is the duty of the Court to consider the interest of the public. That interest is, indeed, the primary matter for the consideration of the Court. Having regard to the facts found by the official receiver, I think the registrar was quite right in refusing to approve of the scheme. I have not dealt with any of the special grounds on which he based his refusal, and I express no opinion about them; but in my judgment he did not intend to confine himself to those grounds. I think that the appeal should be dismissed.

Romer L.J. I am of the same opinion. Upon an application of this kind it is the duty of the Court in the exercise of its discretion to have regard to many things, and among others to the bankrupt's statement of affairs and the conduct of the bankrupt, and in particular to see whether he has been guilty of any misconduct in relation to his affairs. The Court no doubt is not absolutely precluded from allowing an annulment of the bankruptcy, if it is in the interest of the creditors that it should be annulled, merely because the bankrupt has been guilty of some of the offences mentioned in the Bankruptcy Act.

(1) [1901] 1 Q. B. 744.

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BEER,
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Romer L.J.

That fact is not absolutely fatal to an application for annulment; but undoubtedly the Court ought to take into serious consideration the position of the bankrupt when it is proved that he has been guilty of misconduct in order to see whether it is for the interest of the public that the bankruptcy should be annulled. In a case of this kind the Court ought to have regard to the interests of the public and of commercial morality —to the conduct of the bankrupt, on the one hand, and to the interest of the creditors on the other; and if the Court comes to the conclusion that, however beneficial to the creditors the scheme may be, yet it is not in the interest of the public or of commercial morality that the bankruptcy should be annulled, it is their duty to refuse to annul it. In *Ex parte Kearsley* (1) Lindley L.J. said: "It is the duty of the Court to look, not only at the interest of the creditors, but also at the conduct of the debtor. Under some of the circumstances mentioned in sub-s. 6 of s. 18, however beneficial the composition or scheme may be to the creditors, it is the duty of the Court by reason of the conduct of the debtor to refuse to sanction it." And in the same case Lopes L.J. said (2): "I understand it to be left to the discretion of the Court, when a composition appears reasonable, to determine whether the conduct of the debtor is such as to make it more expedient in the interest of the public to punish him than to consult only the interest of the creditors." It must not be forgotten that what the debtor desires is to be able to go out into the world, and when any one reproaches him with his bankruptcy to be able to say, "My bankruptcy has been annulled, and annulled by the order of the Court; my conduct cannot therefore have been very reprehensible, or the Court would not have made the order." Ought such a man as this bankrupt to be allowed to do that? What has been his conduct? He started business as a whisky blender in 1896 with a capital of 100*l.* He carried on business unsuccessfully for about three years, and had then contracted debts amounting to several thousands of pounds. He has paid dividends in the bankruptcy to the extent of 2*s.* 1*d.* in the pound. It is proved that he continued to trade after he knew himself to be insolvent.

(1) 18 Q. B. D. 168, at p. 174.

(2) 18 Q. B. D. 168, at p. 175.

It is proved that he was guilty of misconduct in having appropriated and used for the purposes of his own business money belonging to and received by him on account of his wife without her knowledge or consent. Is that conduct such as to justify the Court in saying that the bankruptcy should be annulled by the order of the Court, so that the debtor may be able to go forth into the world and say that he had not been guilty of any serious misconduct? In my judgment the present case is pre-eminently one in which in the interests of the public and of commercial morality the bankruptcy should not be annulled.

COZENS-HARDY L.J. I agree. I protest most strongly against the notion that when the period for which a bankrupt's discharge has been suspended has expired he has purged his offence, and that he can make a bargain with his creditors for the annulment of his bankruptcy on the payment of a certain sum of money.

Appeal dismissed.

Solicitors: *Harrison & Powell; C. W. & H. B. Taylor; Foy & Co.*

W. L. C.

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1903
March 26.

[IN THE COURT OF APPEAL.]

LANGRISH *v.* WATTS.

Limitations, Statute of—Simple Contract Debt—Acknowledgment of Debt—Special Promise to Pay.

Where, in an action commenced in 1902 upon a promissory note given by the defendant to the plaintiff in 1881, for 100*l.* with interest, payable on demand, it was proved that the defendant had in 1901 written a letter, in which, after asserting that there had been certain payments by him on account of the note, he used expressions importing that he was willing that an account should be taken between himself and the plaintiff, and that he would pay what was thereupon found to be due, and it was found on the trial that no payments had been made on account of the note:—

Held, affirming the judgment of Bruce J., that the letter afforded sufficient evidence of a new promise to take the case out of the Statute of Limitations.

APPEAL against the judgment of Bruce J. in an action tried by him without a jury.

The action, which was commenced in April, 1902, was upon a promissory note given by the defendant to the plaintiff upon December 9, 1881, for 100*l.* with interest, payable on demand. The note was given in consideration of an advance of 100*l.* by the plaintiff to the defendant.

The defendant in his defence pleaded payment as to a portion of the money claimed, and the Statute of Limitations.

The learned judge found that there was no sufficient evidence of any payments by the defendant on account of the note. That finding was not questioned on the appeal, and the only other question was whether upon the following letters written by the defendant there was a sufficient acknowledgment of the debt, or fresh special promise to pay the amount, to take the case out of the Statute of Limitations. Soon after giving the note the defendant had gone to Canada, but before the commencement of action he had returned to this country.

On June 27, 1901, the defendant wrote to the plaintiff's wife: "Dear Aunt Bessie,—On hearing from Maud this morning I was sorry to find that uncle had thought it necessary to get Mary to remind me of the promise I made him when

I saw him last. I fully intended to attend to it at once; but ever since then I have had such a constant drain upon my small means in consequence of my wife's terrible illness that I had put it off, thinking that there would soon be another division, and I should be placed in a better position to meet my obligation to uncle. I am very sorry I have never been in a position to have paid it off years ago. My papers have got considerably mixed up, and I cannot satisfy myself quite as to the exact amount I was owing uncle when I left home the first time. I have some note of what I paid back; but to be clear on the subject I shall be pleased if you can furnish me with particulars to check them with mine, and I will do my best to pay back what I owe. I am writing this to you, as I expect uncle has very little to do with business affairs now."

The "division" referred to in the letter related to property to a share of which the defendant had become entitled under the will of a relative.

The plaintiff's wife replied that the plaintiff told her that none of the money had been repaid.

To this the defendant answered, on July 10, 1901, as follows: "Dear Aunt,—I must say your letter was a great surprise to me. I was well aware that I did give uncle a note for 100*l.* originally, but subsequently I gave him a cheque for 40*l.*, because I kept the stub of the cheque, and I am almost positive I also gave him another cheque for 20*l.*, reducing the amount at the time I left home to 40*l.* How it is uncle did not credit me with it, I cannot think; but if he hunts up his old bank-books he will be able to trace up the amounts, and I feel sure he will be satisfied that I am correct. Anyway I hope so. Just at present I cannot lay my hand upon my bank-book of that date, or would be more positive on the subject. At present I have no money on hand, having bought some houses out of the portion I got, but as soon as there is another division I will send uncle some. In the meantime, I hope you will be able to hunt up the required information."

To this the plaintiff's wife replied to the effect that the plaintiff was sure that none of the amount had been paid.

The plaintiff's wife having written again on October 21, 1901, asking for a settlement of the matter, the defendant, on October 29, 1901, wrote to the plaintiff as follows: "I expect to be down shortly, and will call to see you about the note. If by any means I am not down before long, I will take other means of fixing up the matter. I cannot understand how it is you have no record of the amount I paid you. I am sorry to say that some of my papers have got mislaid or lost, which makes it very awkward, but I may be able to get some information at the bank at Farnham, as I drew a cheque for the amount paid. Anyway I hope to make you a satisfactory settlement."

On November 23, 1901, the defendant wrote, in answer to a further letter from the plaintiff's wife: "Dear Aunt,—In reply to your last letter I beg to say that I do not expect to be down for some time, so to save any trouble in the matter I have placed it in my solicitor's hands for adjustment. You will hear from him in the course of a few posts."

It was admitted that since the letter of July 10, 1901, there had been "another division" of property under the above-mentioned will.

Bruce J. was of opinion that the letters of the defendant did not amount to an acknowledgment that the sum of 100*l.* was due, but he held on the authority of *Prance* v. *Sympson* (1) that they amounted to a conditional promise to pay what, upon an account being taken, might be found to be due from the defendant to the plaintiff, and that, the condition having been fulfilled, the plaintiff was entitled to recover upon that promise, notwithstanding the Statute of Limitations. He therefore gave judgment for the plaintiff for the amount of the note with interest.

Moyses, for the defendant. The learned judge was right in holding that the defendant's letters did not amount to an acknowledgment that the whole of the original debt remained due. At the most they only amounted to an acknowledgment that 40*l.* remained due. But the learned judge was, it is submitted, wrong in holding that the defendant's letters amounted to a fresh special promise to pay what, upon an account being taken, might be found to be due. It is impossible to construe the words "as soon as there is another division, I will send uncle some" as meaning that the defendant promised to pay the whole of the original debt or any larger sum than the balance of 40*l*. [He cited *Prance* v. *Sympson* (1); *Tanner* v. *Smart* (2); *Dabbs* v. *Humphries* (3); *Buckmaster* v. *Russell*. (4)]

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(1) (1854) Kay, 678.

Holman Gregory, for the plaintiff. Looking at the correspondence as a whole, the effect of it is that, although the defendant suggests that there have been payments on account of the debt, he is not clear on the subject, and is willing to pay what on the matter being gone into is found to be due. The words "as soon as there is another division, I will send uncle some" must be read in connection with the rest of the correspondence. The learned judge was justified, having regard to the other expressions used by the defendant, in construing those words as importing a promise, upon another division of property taking place under the will, to pay what, on an account being taken between plaintiff and defendant, might turn out to be due. Therefore the principle of *Prance* v. *Sympson* (1), *Skeet* v. *Lindsay* (5), and *Sidwell* v. *Mason* (6) applies.

Moyses, in reply.

VAUGHAN WILLIAMS L.J. I agree entirely with the decision of Bruce J. that there was not upon the correspondence in this case any acknowledgment of such a nature as to give rise in law to an implied promise by the defendant to pay the full amount of the original debt of 100*l*. We have been referred on that point to the case of *Buckmaster* v. *Russell* (4), which in my judgment was rightly decided. Two points were decided in that case. One was that there was not in that case any sufficient acknowledgment of the debt; and the other was that, where there is a fresh promise which is conditional, the plaintiff can only sue on that promise, if the condition has been fulfilled, and, even where that is the case, the plaintiff cannot recover anything on the fresh promise beyond that

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(1) Kay, 678.

(2) (1827) 6 B. & C. 603; 30 R. R. 461.

(3) (1834) 10 Bing. 446.

(4) (1861) 10 C. B. (N.S.) 745.

(5) (1877) 2 Ex. D. 314.

(6) (1857) 2 H. & N. 306.

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which the promise itself imports. As regards the question of a special promise, the Court held that, as the debtor's offer to pay by instalments, which was made subject to the creditors' approbation of it, was not accepted, and did not meet with the approbation of the creditors, the action could not be maintained on the footing of there having been such a promise; and, that being so, the only other question was whether there was a sufficient acknowledgment of the debt as distinguished from a fresh special promise. With regard to that question, there was not in that case any absolute denial by the defendant that the sum claimed was due, or that any sum was due. He said in his letter that he had no wish to deny a just debt, but he could not get rid of the notion that the account was settled in 1851. It was held that the letter did not amount to a sufficient acknowledgment to take the case out of the statute. Similarly, in the present case, as regards the question whether the correspondence constitutes an acknowledgment of the debt, I agree with Bruce J. that, without straining the language, it is impossible to find in the letter of June 27 or in that of July 10 any acknowledgment of indebtedness to a greater amount than 40*l.*; and the subsequent letters of October 29 and November 23 do not appear to me to carry the case any further in this respect.

But the learned judge proceeded to deal with the case from another point of view. He was of opinion that the effect of the correspondence was that there was an invitation by the defendant to the plaintiff to have the account gone into between them, and a promise by the defendant to pay what, on that being done, might prove to be the amount due from him. That is an invitation which a man may give, and a promise which he may make, although he may previously in the correspondence have denied his indebtedness to the amount claimed, and have suggested that certain specific payments have been made by him on account of the original debt. The effect of the correspondence as a whole may, notwithstanding those statements, be that he makes a fresh promise, if an account be taken, to pay what is found to be due from him on that account. This case appears to me to be on the border line, but I am not prepared to say that the construction so put by Bruce J. upon the defendant's letters was wrong. The cases of *Prance* v. *Sympson* (1), *Sidwell* v. *Mason* (2), and *Skeet* v. *Lindsay* (3) are ample authority to shew that such a promise, that is to say a promise to pay the balance which may be ascertained to be due in respect of the original debt upon an account being taken, is a sufficient promise to take a case out of the Statute of Limitations. Looking at the common law cases on the subject, apart from any question of a claim in equity to an account, they appear to shew that, where a defendant in effect has said that he does not think that he owes so much as is claimed, but, if vouchers are furnished, he will pay whatever is due, that is an acknowledgment of a debt subject to the business operation of ascertaining the amount being gone through. That operation was in this case gone through at the trial, and Bruce J. arrived at the conclusion that the full amount of 100*l*. and interest was still due. Under these circumstances I think the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The question in this case is whether upon the defendant's letters there is a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. I agree with Bruce J. that the letters do not amount to an acknowledgment that the whole debt of 100*l*. remained due, from which a promise to pay that amount might be inferred by law. In my judgment the case depends upon the meaning of the promise contained in the words "as soon as there is another division, I will send uncle some" in the letter of July 10. The question appears to me to be whether those words import, as the learned judge held they did, a special conditional promise to pay the whole amount of the original debt, if shewn to be still due, or only to pay the balance of 40*l*. admitted on the correspondence to be due. It is admitted that there has been "another division" since the writing of that letter, and therefore the condition imported by the words "as soon as there is another division" has been fulfilled. The question therefore is as to the meaning of the words "I will send uncle some." Now the letter starts with an admission by the defendant that he originally owed 100*l.*, but he asserts that he subsequently gave the plaintiff a cheque for 40*l.*, because he kept the stub of the cheque, and he says that he is almost positive that he gave the plaintiff another cheque for 20*l.*, thus reducing the debt to 40*l.* So far there is only an admission of an existing indebtedness to the amount of 40*l.*, which would not be enough, the question being whether there is any promise to pay the total amount of the original debt. He goes on to say that he cannot think how it is that his uncle did not credit him with the amounts paid, but that, if he hunts up his old bank-books, he will be able to trace up the amounts. I think that, on the fair construction of the whole letter, the effect of it is that the defendant admits that the plaintiff is entitled to 40*l.*, and, on "another division" taking place, he will at any rate send him that amount, but, if on a proper investigation it should turn out that the supposed payments of 40*l.* and 20*l.* on account have not been made, he is willing to pay the whole of what may appear to be due.

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(1) Kay, 678. (2) 2 H. & N. 306. (3) 2 Ex. D. 314.

MATHEW L.J. I am of the same opinion. I think that the result of the correspondence taken as a whole is that the defendant admits that originally he owed 100*l.*, and that he is in a state of uncertainty as to how the account stands between himself and the plaintiff; and that he agrees that the account shall be gone into, and that he will pay so much as may thereupon be found to be due. Having regard to the other expressions in the defendant's letters, I do not think that the promise to be inferred from the words "as soon as there is another division, I will send uncle some" can be confined to the 40*l.* balance which is admitted by the letters to be owing. After what has already been said with regard to the earlier letters of June 27 and July 10, it is not necessary for me to refer to them again in detail, but the general effect of them, in my opinion, is that the defendant is willing that the matter should be gone into, and an account taken as between himself and the plaintiff. The later letters of October 29 and November 23 appear to me to be of similar import. In the letter of October 29 the defendant states that, if he is not down before long, he will "take other means of fixing up the matter"; and then, after expressing astonishment that the plaintiff has no record of any amount paid to him, he proceeds to say that some of his papers have got mislaid or lost, which makes it very awkward, but he "may be able to get some information at the bank at Farnham," and anyway he hopes "to make a satisfactory settlement." Then in the letter of November 23 he says that he does not expect to be down for some time, and that, to save any trouble in the matter, he has placed it in his solicitor's hands "for adjustment." It appears to me that these later letters confirm the construction which we have put on the earlier letters. Various authorities have been cited. I think that the cases of *Prance* v. *Sympson* (1), *Skeet* v. *Lindsay* (2), and *Sidwell* v. *Mason* (3) entirely support the view we are taking. The defendant's counsel relied on the case of *Buckmaster* v. *Russell.* (4) But, when that case is looked at, it will be found that it is not in any way inconsistent with the construction which we are putting upon the letters in the present case. The earlier part of the letter in that case, which was relied upon as an acknowledgment of the debt, obviously did not amount to an acknowledgment that the debt was still owing, but on the contrary suggested that it had been paid. The letter then went on to say that, as the plaintiffs declared that the debt was not settled, the defendant was willing to pay the amount by instalments of 10*l.* per annum, if that proposal met the plaintiffs' approbation. The proposal did not meet the plaintiffs' approbation. So the result was that there was neither an absolute acknowledgment of the debt, nor any fresh special promise. The decision in that case is not touched by anything that we are deciding in the present case. I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Prior, Church & Adams, for C. & W. Trimmer, Alton, Hants.*

Solicitors for defendant: *Kingsbury & Turner.*

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(1) Kay, 678.

(2) 2 Ex. D. 314.

(3) 2 H. & N. 306.

(4) 10 C. B. (N.S.) 745.

E. L.

C. A.

1903

March 18.

[IN THE COURT OF APPEAL.]

TORKINGTON *v.* MAGEE.

Chose in Action—Assignment—Contract to sell Reversionary Interest—Assignment by Purchaser of Benefit of Contract—Right of Assignee to sue Vendor for Damages—Legal Chose in Action—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Darling J., and Channell J.) upon an appeal from the Mayor's Court, reported [1902] 2 K. B. 427. (1)

The action was brought by the plaintiff claiming to sue, by virtue of the Judicature Act, 1873, s. 25, sub-s. 6, as assignee of a contract made by the defendant with one Rayner to sell to the latter a reversionary interest in certain funds under a settlement, for damages for breach of that contract by the defendant.

The action was tried by the Common Serjeant, who held that there had been a breach of contract by the defendant, but that s. 25, sub-s. 6, of the Judicature Act, 1873, did not entitle the plaintiff, as assignee of the contract, to sue for damages in his own name. He therefore gave judgment for the defendant, but assessed the damages provisionally at 100*l*.

The Divisional Court held on appeal that the learned Common Serjeant's decision was wrong, and that the plaintiff was entitled to maintain his action; and they therefore ordered judgment to be entered for the plaintiff for 100*l*.

Montague Lush, K.C., and *M. M. Macnaghten*, for the defendant, contended that the case was not one of an assignment of a "legal chose in action" within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6; and secondly that there was no evidence of any breach of the contract by the defendant, inasmuch as the evidence conclusively shewed that neither the plaintiff's assignor, Rayner, nor the plaintiff himself, had been ready and willing to carry out the contract, unless the defendant would comply with a requisition which he was not bound to comply with under the contract.

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(1) It has been thought desirable to insert in the Reports this note of the result of the appeal, although the Court of Appeal did not, in reversing the decision of the Divisional Court, decide the point of law in respect of which the case was reported in the King's Bench Division. After considerable discussion of the point, the Court came to the conclusion that it did not really arise, because on the facts there was no breach of contract by the defendant.

Stewart-Smith, K.C., and *Sidney W. Clarke*, for the plaintiff, contra.

THE COURT (Vaughan Williams L.J., Stirling L.J., and Mathew L.J.) held that it was not necessary for the purposes of the appeal to decide whether, under s. 25, sub-s. 6, of the Judicature Act, 1873, the plaintiff, as assignee of the contract, was entitled to sue for damages for breach of the contract, if any, in his own name; for, assuming that he was, the evidence clearly shewed that there was no cause of action against the defendant, inasmuch as neither the plaintiff's assignor, Rayner, nor the plaintiff himself, was ready and willing to carry out the contract in accordance with its terms. They therefore allowed the appeal, and ordered judgment to be entered for the defendant.

Appeal allowed.

Solicitor for plaintiff: *J. W. Browne.*
Solicitor for defendant: *G. J. Fowler.*

E. L.

1903
Jan. 16.

WIRRAL RURAL DISTRICT COUNCIL *v.* CARTER.

Streets (Streets and Buildings)—Private Street—Execution of Works by Local Authority—Liability of Owner—Notice of Provisional Apportionment—Public Streets Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 12; *Schedule, Part I.—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 267.

Where works are executed by a local authority under the provisions of the Private Streets Works Act, 1892, it is a condition precedent to the right of the local authority to recover from an owner of premises in the street his apportioned share of the expenses that notice of the provisional apportionment of the estimated expenses, as well as notice of the final apportionment of the ascertained expenses, shall have been served upon him.

Appeal from the judge of the Birkenhead County Count.

The action was brought to recover the apportioned amount of expenses incurred by the plaintiffs in the execution of certain works under the Private Streets Works Act, 1892. The facts, which were not in dispute, shewed that the plaintiffs resolved with respect to a street in their district called Quarry Road to execute therein certain works, being private street works as defined by s. 6 of the Private Streets Works Act, 1892, and their surveyor duly prepared a specification of the works with plans and sections, and an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act. In the provisional apportionment were included certain premises of which the defendant was in fact, though not to the knowledge of the plaintiffs, the owner. Notice under s. 6 of the Act of the provisional apportionment in respect of these premises was in March, 1901, sent by the plaintiffs to "The Heswall Quarry Company, Limited, D. Robinson, Manager," who were described as the owners, or reputed owners, of the premises in the provisional apportionment; Robinson, who received the notice, was the uncle of the defendant, and had at a previous date been tenant of the premises. No notice of the provisional apportionment was ever given by the plaintiffs to the defendant. On April 16, 1901, after completion of the works, a final apportionment of the expenses under s. 12 was made by the surveyor, in which the Heswall Quarry Company were described as owners, or reputed owners, as in the provisional apportionment, and notice of the final apportionment was sent and served as before and received by Robinson. Subsequently the plaintiffs became aware that the defendant was the real owner of the premises, and in August, 1901, the final apportionment was amended by substituting the defendant's name as owner for that of the Heswall Quarry Company, and notice of the final apportionment so amended was served upon the defendant. The defendant having refused to pay the apportioned sum, about 60*l.*, this action was brought in the High Court to recover the amount, and was remitted to the county court. The county court judge held that on the evidence the quarry company were not the reputed owners; that service of notice of the provisional apportionment on the defendant as the real owner of the premises was a condition precedent to the right of the plaintiffs to recover the apportioned amount, and gave judgment for the defendant. The plaintiffs appealed.

Naldrett (*Macmorran K.C.*, with him), for the plaintiffs. The plaintiffs are entitled to recover. By Part I. of the schedule to the Act of 1892 a provisional apportionment must, in addition to other particulars, state the names of the respective owners, "or reputed owners." Here the names of the quarry company were inserted in the provisional apportionment as reputed owners under the powers conferred by the schedule, and the service of the notice upon the persons so inserted in the provisional apportionment was a good service under s. 267 of the Public Health Act, 1875, which is the section governing service of notices under the Act of 1892. The fact that the names of the reputed owners are inserted in the provisional apportionment and that notice is served on them does not prevent the local authority inserting the name of the real owner in the final apportionment and recovering the expenses from him. Under s. 14 of the Act of 1892 the local authority are entitled to recover the expenses from the real owner without regard to anything that has been done before.

Carver, K.C. (*Rigby Swift* with him), for the defendant. The defendant is not liable; there has been no service of the notice of provisional apportionment sufficient to satisfy the requirements of the Act of 1892. It is even more important that the real owner should have notice under the Act of 1892 than it is under the Public Health Act, 1875, or was under the Public Health Act, 1848, for under the more recent Act the owner has not the option of doing the work himself, and is therefore entitled to the fullest notice of what the local authority intends to do. Under s. 69 of the Public Health Act, 1848, notice of intention to execute the work must have been served upon the actual owner or occupier at the date of the notice in order to make him liable to the apportioned share of expenses: *Jarrow Local Board* v. *Kennedy* (1); *Farnworth Local Board* v. *Compton* (2); and the same rule obtains under s. 150 of the Public Health Act, 1875: *Wallsend Local Board* v. *Murphy*. (3) Besides, s. 6, sub-s. 3, of the Act of 1892 is precise; under it, copies of the provisional apportionment are to be served on "the owners" of the premises liable to be charged; this direction is imperative, and imposes a condition precedent to the liability of the owner.

Naldrett, in reply. The decisions on s. 69 of the Public Health Act, 1848, and s. 150 of the Public Health Act, 1875, are no authorities in the present case. The requirements of those Acts were necessarily different from those of the Act of 1892, for under the earlier Acts the owner could do the work himself, and therefore it was imperative that he should be served with a notice of the work that he was required by the local authority to do. Under the Act of 1892 the important matter is to put the premises themselves into the apportionment, whether provisional or final, so that the local authority may have a charge upon them under s. 13 of the Act.

[CHANNELL J. The case of *Wallsend Local Board* v. *Murphy* (3) seems to shew that a past owner cannot be treated as the reputed owner.]

(1) (1870) L. R. 6 Q. B. 128.

(2) (1886) 34 W. R. 334.

(3) (1889) 61 L. T. 777.

The answer to that is that there is no mention of the reputed owner in s. 150 of the Public Health Act, 1875.

LORD ALVERSTONE C.J. I am of opinion that the decision of the county court judge is right, though I should have been glad to feel myself able to come to a contrary conclusion, for there are no merits in the objection raised. Prior to the passing of the Private Streets Act, 1892, which is an adoptive Act, where work was done by a local authority under s. 150 of the Public Health Act, 1875, it was held that the absence of service on the owner of a notice of intention to execute the work prevented his being charged with the apportioned sum, and that service on the previous owner was insufficient; that principle affords us a guide in the present case. The Act of 1892 gives important rights and privileges to persons who are to be charged with contributions towards private street improvements: they are enabled to raise before the work is done a number of objections, many of which they either could not have previously raised at all or only at a later stage of the proceedings, such, for instance, as that the highway to be repaired is a highway repairable by the inhabitants at large. And, further, by s. 8 of the Act of 1892 it is provided that objections are not to be raised in any other way than that contemplated by the Act itself. Under these circumstances, and looking at the Act of 1892, it seems to me that effective service is just as necessary as under s. 150 of the Public Health Act, 1875. It was contended on behalf of the plaintiffs that there was a fundamental distinction between proceedings under the two Acts, inasmuch as under s. 150 of the Public Health Act there is an option in the owner to do the work himself, while under the Private Streets Works Act he has no such option. As a general argument that is no doubt true, but it is of little weight, for the option under s. 150 was one of which in practice the owners rarely availed themselves. There being no such option under the Act of 1892, I think that the service of a notice upon the owner is really even more necessary than it is under s. 150 of the Act of 1875. The Act of 1892 provides that a copy is to be served on the owners of the premises shewn as liable to be charged in the provisional apportionment, while the provisions as to service in the Public Health Act, 1875, provide a liberal means of service in cases where the owner is not known. In the present case we must take it, upon the evidence, that the notice was not served on the owner, and that he did not know of it. Although it is very possible that if the defendant had had a notice he would have done nothing, I think we are bound by a series of decisions and by statutory enactment to say that he is not bound to pay the apportioned sum claimed by the plaintiffs. The plaintiffs contend that the objection is cured by s. 12 of the Act of 1892, which provides for the making of a final apportionment after the work has been done, and gives certain rights of objection to the owners against the final apportionment; but on comparing these rights with the rights of objection given to owners in s. 7 it is obvious that they are by no means identical, and therefore the owner who gets notice only of the final apportionment is by no means in the same position as he would have been in if he had had a notice under s. 7 of the provisional apportionment; and this is so whether there has in the meanwhile been a change of ownership or not. I think therefore that service upon the defendant of a notice of the provisional apportionment was a condition precedent to his liability.

WILLS J. I am of the same opinion. I may point out that in considering whether words in an Act of Parliament are merely mandatory, that is to say, whether what they direct to be done is not in the nature of a condition precedent to the taking of any further step, or whether they do really impose a condition precedent, we must look carefully to see what the words are there for and what will be the consequences of obedience or disobedience of their requirement. Frequently obedience to mandatory words may be a matter of very small consideration; but in the present case the owner, on receipt of the notice which the local authority is directed to give, acquires the right of objecting to the provisional apportionment on the grounds specified in s. 7 of the Act; to my mind that fact alone affords a very strong ground for saying that the giving of the notice is a condition precedent to the right of the local authority to saddle the owner with a liability for the apportioned expenses of the work. The provisions of s. 12 confirm and emphasize that view, for after the execution of the works and the final apportionment of the expenses, the only objections that can be taken are that the estimated expenses have been exceeded by more than 15 per cent., that the final apportionment has not been made in accordance with the section, and that there has been an unreasonable departure from the specifications, plans, and sections. The appeal must therefore be dismissed.

CHANNELL J. I also concur, but in the particular case with reluctance, for I am satisfied that if the notice of the provisional apportionment had been addressed to "the owner," as it might have been, the proceedings would have been perfectly regular, and the defendant would have had to pay, even, I think, if the notice had not come to his knowledge. It is clear that an objection to a provisional apportionment under the Act of 1892 on the ground that it does not contain the correct name of the owner is not necessarily a fatal objection, for by s. 6 it is to contain the particulars prescribed in Part I. of the schedule, among which are the names of the respective owners, "or reputed owners." I feel some doubt whether the learned county court judge gave a proper interpretation to the phrase "reputed owner"; it must mean the person whom the local authority really believes to be the owner, and a person who has been the owner, and whom the local authority has dealt with as such, is certainly a reputed owner. But service of the notice must be made under s. 267 of the Public Health Act, 1875, with which the Act of 1892 is to be read, and where the notice is addressed to a particular person it is to be served by delivery at his residence, and where it is addressed merely to the owner or occupier (without naming him) it may be served by delivering it to any person on the premises, or if there is no one there by fixing it on some conspicuous part of the premises. If therefore the plaintiffs, instead of addressing the notice of the provisional apportionment to the Heswall Quarry Company, had addressed it simply to "the owners," the service would have been good and regular; but unfortunately they did not avail themselves of that provision. I agree that there is no real difference in the reasons for service of the notice of intention to do the work under the Act of 1875 and notice of the provisional apportionment under the Act of 1892, and under the former Act it is clear that service on the person to be charged was a condition precedent.

Appeal dismissed.

Solicitors for plaintiffs: *Cunliffe & Davenport, for Churton, Chester.*

Solicitors for defendant: *J. E. & H. Scott, for Thompson, Hughes & Co., Birkenhead.*

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[IN THE COURT OF APPEAL.]

MERCER *v.* LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY.

Lands Clauses Acts—Compensation—Lands Injuriously Affected—Interest created after Notice to Treat—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68.

The principle that an interest in land the subject of a notice to treat, created subsequently to the date of the notice, cannot form the subject of compensation under the Lands Clauses Consolidation Act, 1845, applies also to adjoining lands of the same landowner which are injuriously affected by the execution of the works of the promoters. After service of a notice to treat no onerous interest, either in land taken or in land injuriously affected, can be created by the landowner to the prejudice of the promoters.

Decision of Lord Alverstone C.J., [1901] 2 K. B. 753, reversed.

APPEAL from the decision of Lord Alverstone C.J. at the trial of the action without a jury. (1)

The following statement of facts is taken from the judgment of the Lord Chief Justice.

The action was brought by a Mrs. Mercer to recover the sum of 371*l.* 10*s.*, the amount of an award made under the Lands Clauses Act, and the costs, subject to taxation, of the arbitration. The award was made on March 5, 1897, in respect of the injurious affection of certain leasehold land and houses adjoining Birchley Street, St. Helen's, belonging to the plaintiff. The land in question forms part of the estate of Lord Gerard, and previously to the granting of the lease hereinafter referred to was in his possession as owner. Before the year 1886 certain streets had been laid out and partially constructed, and at the time of the application to Parliament in 1886, hereinafter mentioned, a certain street known as Standish Street was already in existence. Certain other streets communicating with Standish Street, and, among others, Birchley Street, had already been laid out though not constructed. In the years 1885 and 1886 applications were made in Parliament by the predecessors of the defendant company for powers to construct a railway from St. Helen's to Wigan, and by the St. Helen's and Wigan Junction Act, 1886 (50 Vict. c. xxxiii.), s. 4, powers were granted to construct, among others, Railway No. 4, in the township of Windle, commencing by a junction with a certain other line of railway, and terminating at or near the intersection of College Street and Corporation Street, which is a short distance to the south of Standish Street. In the passage of that bill through Parliament an agreement was come to by Lord Gerard and the promoters which was embodied in s. 13 of the Act of 1886. By that section the company became bound within twelve months from the passing of the Act to purchase certain land, indicated upon a certain plan, and the section contained provisions whereby the company were to take land for, and make, sewer, and flag half of Birchley Street, construct a bridge to carry the railway over Standish Street, and lower the other streets and adjoining building land to correspond with the streets which had to be lowered to be passed under the railway. The Act incorporated the Lands Clauses Act, and s. 21 contained the usual limits of time for exercising the compulsory powers. By an Act of 1889 (52 & 53 Vict. c. xci., s. 18), the twelve months mentioned in s. 13 of the Act of 1886 was extended for one year from July 26, 1889, to July 26, 1890; and by an Act of 1891 (54 & 55 Vict. c. cxv., s. 3), the powers of compulsory purchase under the Acts of

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1885 and 1886, which had become vested in the defendants, were extended until July 20, 1893. But there was no further extension of the twelve months mentioned in s. 13 of the Act of 1886.

Prior to the year 1891 nothing had been done by the railway company to carry out the agreement embodied in s. 13 of the Act of 1886. On October 23, 1891, the defendants served upon Lord Gerard a notice to treat to take the land necessary for the railway. The plan annexed to the notice to treat was for the purpose of this case identical with the plan referred to in s. 13 of the Act of 1886. The notice to treat did not refer to s. 13, nor was it in any way given under that section; it was an ordinary notice to treat given by the defendants under their compulsory powers to acquire compulsorily the land shewn upon the plan. On January 12, 1892, Lord Gerard sent in his claim under the notice to treat. This claim was made subject to and upon the basis of the company carrying out the provisions of s. 13 of the Act of 1886. In the month of February, 1892, Lord Gerard's agent agreed with one John Gleave, the predecessor in title of the plaintiff, to let him certain land on the east side of Birchley Street, opposite the land in respect of which notice to treat had been given by the railway company, for a term of 999 years. The land was let for the purpose of building. On June 14, 1892, a lease was granted pursuant to that agreement, the term reserved being from January 1, 1892, and the lease contained provisions that the lessees should within twelve calendar months build a certain number of houses on the land demised. Some of the houses were in fact built during the summer of 1892, and some of those houses were occupied by tenants of Gleave prior to October, 1892. On October 14, 1892, an agreement was made between Lord Gerard and the defendants in respect of the land included in the notice to treat, and under that agreement Lord Gerard agreed to sell the land shewn upon the plan annexed to the notice to treat, a copy of which was also annexed to the agreement, for the sum of 23,000*l*., such sum to include all satisfaction and compensation for all damages sustained by the vendor by reason of the severing of the property purchased from the vendor from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers. By clause 4 of the agreement the purchase was to be completed on November 30, 1892. The agreement provided by clause 6 that the company should make, sewer, flag, and channel the western half of Birchley Street. The purchase was not completed on the date contemplated. In the year 1893 Lord Gerard commenced proceedings to obtain specific performance of the agreement of October 14, 1892, and subsequently, upon November 27, 1894, a deed of conveyance was executed by Lord Gerard whereby, after reciting that the defendants had agreed with him, the vendor, for the purchase of the land thereinafter conveyed, and, among others, of the rights conferred by s. 13, sub-s. 3, of the Act of 1886, for the sum of 24,209*l.*, which sum it had been agreed should include all satisfaction and compensation for all damage sustained by the vendor, or by reason of the severance of the property purchased from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers, Lord Gerard conveyed the land, the subject of the notice to treat, to the defendants. Subsequently to October, 1894, the defendants constructed the railway, lowered the level of Standish Street and of the northern end of Birchley Street so as to bring it to the same level at the junction of Standish Street with an upward incline towards the south, and put up a retaining wall to support the plaintiff's houses. The result of these operations by the defendants was that the access to the plaintiff's houses was permanently interfered with. On November 12, 1895, the plaintiff gave a notice claiming compensation for injurious affection under the 68th section of the Lands Clauses Act, and appointed an arbitrator, and, the usual formalities having been observed, the umpire in due course made his award, awarding to the plaintiff the sum of 371*l.* 10*s.* in respect of the damage and injury sustained by the plaintiff in or to her lands, messuages, and hereditaments by reason of the execution of the works of the company, and by reason of such lands, messuages, and hereditaments being injuriously affected.

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The Lord Chief Justice gave judgment for the plaintiff. (1) The defendants appealed.

Horridge, K.C., and *J. K. F. Cleave* (*McCall, K.C.*, with them), for the defendants. The judgment of the Lord Chief Justice proceeded upon the view that, there having been no extension beyond 1890 of the time mentioned in s. 13 of the Act of 1886, the provisions of s. 13 and the agreement embodied therein had altogether lapsed, and that the case must be treated on the footing that the defendants had taken the land under their compulsory powers derived from the Lands Clauses Consolidation Act, 1845. Assuming the correctness of that view, the plaintiff would nevertheless not be entitled to compensation. A notice to treat under s. 18 is a notice of the willingness of the promoters to treat with the landowner, not only for the purchase of the land required for their undertaking, but also as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works; and the machinery contained in that and the following sections is framed with a view to the compensation being assessed once and for all by the same assessment, both as regards the purchase-money for the land taken and the damage done by the execution of the works to other adjoining land in which the owner has an interest at the date of the notice to treat. By s. 63, in estimating the purchase-money or compensation to be paid by the promoters, regard is to be had, not only to the value of the land taken, but also to the damage to be sustained by the owner by reason of severance of the land taken from his other lands, or otherwise injuriously affecting his other lands by the exercise of the statutory powers. In the present case both the notice to treat and the particulars of claim sent in by Lord Gerard included damage by injuriously affecting other lands belonging to him, and the agreement with him as to the amount of compensation stated that it was to include such damage. Where land is taken compulsorily, it is well settled that, unless the promoters agree upon any restriction as to the works to be executed, the

(1) [1901] 2 K. B. 753.

damage must be estimated on the assumption that the promoters will execute any work which they have power under their Act to execute. Therefore the compensation which Lord Gerard could claim would include compensation for the damage in respect of which the plaintiff now claims compensation. The owner of land in respect of which notice to treat has been given cannot, after service of the notice, create a fresh interest in that land which will be the subject of compensation: *Ex parte Edwards* (1); *Wilkins* v. *Mayor of Birmingham.* (2) The same principle applies to compensation for injuriously affecting other lands belonging to the owner of the land taken; he cannot impose a greater burden upon the promoters by creating a new interest in his land which is not included in the notice to treat. Compensation must, except possibly where the damage cannot be foreseen, be assessed once for all, and the owner of land taken, whose compensation has been once assessed, cannot subsequently claim further compensation for injuriously affecting his adjoining land: *Croft* v. *London and North Western Ry. Co.* (3); *Todd* v. *Metropolitan District Ry. Co.* (4) Lord Gerard himself, therefore, could not have claimed further compensation in respect of this land; neither can the plaintiff, whose interest is derived from him, do so.

[They also cited on this point *Cowper-Essex* v. *Acton Local Board.* (5)]

Secondly, on the assumption that the provisions of s. 13 of the Act of 1886 had not lapsed, and that the statutory agreement therein contained remained in force at the time when the works were executed, the plaintiff is not entitled to compensation. The claim made by Lord Gerard was on the footing that those provisions had not lapsed. The section was inserted for the benefit of Lord Gerard, and it may be argued, therefore, that the limit of twelve months mentioned in it was for his benefit; but he could waive it if he chose, and in the event of his doing so the promoters could not claim to disregard the

(1) (1871) L. R. 12 Eq. 389.
(2) (1883) 25 Ch. D. 78.
(3) (1863) 3 B. & S. 436.
(4) (1871) 24 L. T. (N.S.) 435.
(5) (1889) 14 App. Cas. 153.

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restrictions imposed upon them by the section as a condition of their being allowed to execute the works. Regarding the case from that point of view, the damage to the plaintiff's houses resulted from the statutory agreement having been carried out in part only, and not in toto, by lowering the level of part of Birchley Street, but not that of the land on which the plaintiff's houses stand. It may be questionable whether the statutory agreement includes an obligation to lower the land, which had no buildings upon it when the agreement was made, now that houses have been built upon it; but, however that may be, it is clear that the remedy for not carrying out the terms of the statutory agreement would be by action, and not by way of compensation.

[They also cited *Tiverton and North Devon Ry. Co.* v. *Loosemore.* (1)]

Cripps, K.C., and *MacConkey*, for the plaintiff. It is admitted that a notice to treat binds the lands comprised in it which the promoters are seeking to acquire, so that an interest created in those lands by the owner after service of notice to treat on him is not a subject of compensation under the Lands Clauses Consolidation Act, 1845. But no case has gone the length of suggesting that the same doctrine applies to an interest created by the landowner in his adjoining land which is not required by the promoters, but is injuriously affected by the execution of their works. It is not a reasonable result of the exercise by promoters of their compulsory powers that the owner of a large estate, who has been served with a notice to treat in respect of a small portion of his land, should be unable after that date to create a fresh interest in his adjoining land except subject to the notice to treat. A notice to treat does not, until after assessment of the purchase-money and compensation, constitute a contract of sale enforceable by a decree of specific performance: *Mason* v. *Stokes Bay Pier Co.* (2); *Harding* v. *Metropolitan Ry. Co.* (3); by itself it is of the nature of an inchoate contract, and that only as to the land comprised in it: *Adams* v. *London and Blackwall Railway* (4);

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(1) (1884) 9 App. Cas. 480.
(2) (1862) 32 L. J. (Ch.) 110.
(3) (1872) L. R. 7 Ch. 154.
(4) (1850) 2 Mac. & G. 118.

Metropolitan Railway v. *Woodhouse.* (1) It cannot be that the service upon the landowner of a notice amounting at most to an inchoate contract in respect of lands comprised in it prevents him from dealing with his other lands.

[VAUGHAN WILLIAMS L.J. No doubt he can deal with his other lands; the question is whether the fresh interest which he creates in them is a subject for compensation.]

If a landowner between the service of the notice to treat and the assessment of compensation were to sell his adjoining land, he would not be entitled to compensation for the injurious affection of that land, in which at the date of the assessment he had no interest; upon the sale, the owner's right to compensation would pass to the purchaser, for the owner himself would not be injuriously affected. As between the vendor and the promoters no doubt there can be but one assessment, except in the case where at the time of assessment the damage resulting from the injurious affection of adjoining lands of the owner cannot be foreseen; future injury resulting in future damage may be the subject of a subsequent assessment: per Fry L.J. in *Reg.* v. *Poulter* (2); the injurious affection may not occur for several years after the notice to treat, and compensation in respect of it may be claimed when the injury happens by the person whose interest is injuriously affected. There is nothing to shew that, in fixing the amount of compensation paid to Lord Gerard, damage of the nature of that for which the plaintiff claims compensation was in fact taken into consideration.

[They also cited *Carter* v. *Great Eastern Railway* (3); *Lancashire and Yorkshire Railway* v. *Evans* (4); *Duke of Bedford* v. *Dawson.* (5)]

McCall, K.C., in reply.

Cur. adv. vult.

Jan. 31. VAUGHAN WILLIAMS L.J. I have had the advantage of reading the judgment which has been prepared by Stirling L.J., and I so entirely agree with it that it would serve no useful purpose for me to deliver a separate judgment in my own language. There is, however, one observation which I shall have to make after my learned brethren have delivered their judgments.

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(1) (1865) 34 L. J. (Ch.) 297.

(2) (1887) 20 Q. B. D. 132, at p. 138.

(3) (1863) 8 L. T. (N.S.) 197.

(4) (1851) 15 Beav. 322.

(5) (1875) L. R. 20 Eq. 353.

STIRLING L.J. read the following judgment:—The material facts to be borne in mind are these. On October 23, 1891, the defendants under their special Acts served upon Lord Gerard, the owner in fee, a notice to treat in respect of certain specified lands, the notice, in accordance with s. 18 of the Lands Clauses Act, 1845, in particular demanding from him particulars of his estate and interest in such lands and of the claims made by him in respect thereof, and stating that the defendants were willing to treat for the purchase thereof, and as to compensation to be made for damage that might be sustained by reason of the execution of the works. On January 12, 1892, Lord Gerard sent in his claim. On October 14, 1892, an agreement was executed between Lord Gerard and the defendants, and on November 27, 1894, there was a conveyance by Lord Gerard to the defendants of the land comprised in the notice to treat. On June 14, 1892, before either the agreement or the conveyance had been executed, a lease was granted by Lord Gerard to the plaintiff or the plaintiff's predecessor in title of certain building land not comprised in the notice to treat, and on this land the lessee proceeded to erect houses. It is to be taken that the lessee had no knowledge of the notice to treat having been served when the lease was granted, nor had the railway company any notice of the lease when the agreement with Lord Gerard was entered into or the conveyance executed. Subsequently to the date of the conveyance the defendants executed works which necessitated the lowering of a street on which the plaintiff's land abutted, and thereby injuriously affected such land. The plaintiff thereupon claimed from the defendants compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, and the sum of 371*l.* 10*s.* was by award of an arbitrator found as the amount of compensation. The question is whether the plaintiff is entitled to this amount.

No case has been cited which exactly covers the point which arises for decision; but the effect of a notice to treat as regards lands proposed to be taken has been frequently considered. The result of the decisions appears to me to be stated with perfect accuracy by Kindersley V.-C. in *Haynes* v. *Haynes*. (1) The learned Vice-Chancellor says: "I consider that the notice to treat constitutes, as between the landowner and the company, the relation of vendor and purchaser to a certain extent and for certain purposes (that is the language of Lord Cottenham in *Adams* v. *London and Blackwall Ry. Co.* (2)), and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the Act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned judges, which seem to intimate that it is a contract; but that in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner." It is at the same time to be observed that the rights and obligations created by the service of a notice to treat, if they fall short in some respects of those which arise under an ordinary contract of sale, are in other respects much greater. For example, under s. 85 of the Lands Clauses Consolidation Act, 1845, the promoters may, upon complying with the requirements of the section and before the purchase-money has even been ascertained, enter upon and use the lands; and it has been expressly decided that after such entry a railway company has a legal interest in the land: *Worsley* v. *South Devon Ry. Co.* (3); see also the judgment of Lord Campbell in *Marquis of Salisbury* v. *Great Northern Ry. Co.* (4), and the remarks of Lord Bramwell in advising the House of Lords in *Tiverton and North Devon Ry.*

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(1) (1861) 1 Dr. & Sm. 426, at p. 450.

(2) 2 Mac. & G. 118.

(3) (1851) 16 Q. B. 539.

(4) (1852) 17 Q. B. 840.

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MERCER
v.
LIVERPOOL,
ST. HELEN'S
AND SOUTH
LANCASHIRE
RAILWAY.

Stirling L.J.

Co. v. *Loosemore.* (1) Indeed, it seems to me on principle that the rights and obligations created, being derived from a statute, must of necessity be legal, in the sense that Courts of Equity are bound to recognise and give effect to them.

Now at law a contract for the sale of land creates merely a personal obligation between the vendor and purchaser and does not bind the land; in equity such a contract binds the land, and that not only as against the vendor, but also as against all persons claiming under him with notice of the existence of the contract. On the other hand legal rights and interests in and to land bind all persons, whether with notice or not; and I apprehend that rights and interests arising under a notice to treat fall within this rule. It is for this reason, as it seems to me, that it has been held that an interest in land which has been created by the owner after service of a notice to treat is not a subject for compensation under the Lands Clauses Consolidation Act, 1845: see, for example, *Ex parte Edwards* (2); *Wilkins* v. *Mayor of Birmingham.* (3) In accordance with the same principle, it was laid down by Lord Romilly in *Carnochan* v. *Norwich and Spalding Ry. Co.* (4) that the purchase of land in respect of which a railway company has served a proper notice to treat, and in respect of which the company has entered into possession, is "in truth but the purchase of an interest in the purchase-money."

So far I have dealt only with the effect of the notice to treat with respect to land required to be taken. As regards compensation for damage to be sustained by the landowner by reason of the execution of the works, the scheme of the Lands Clauses Consolidation Act, 1845, appears to be that an assessment of such compensation shall be made once for all and finally, so that on payment of the compensation thus ascertained the promoters are to be free from all further claim by the landowner, except possibly in respect of damage entirely unforeseen by the parties: see *Croft* v.

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(1) 9 App. Cas. 480, at p. 511.

(2) L. R. 12 Eq. 389.

(3) 25 Ch. D. 78.

(4) (1858) 26 Beav. 169.

London and North Western Ry. Co. (1); *Todd* v. *Metropolitan District Ry. Co.* (2) It would entirely defeat this scheme if the landlord, after being paid such compensation, were to create interests in persons who could make claims for damage which the promoters were bound to include in the notice to treat and pay for in advance. It appears to me, therefore, that what the Legislature has done is to create in favour of the promoters of undertakings a right unknown to the common law, namely, a right upon certain conditions being satisfied to execute works so as to damage the property of a landowner on whom a notice to treat is served. This right is a legal, as distinguished from an equitable, right, not indeed falling within the definition of an easement, but bearing a close analogy thereto. The result therefore would be that, if the compensation claimed by Lord Gerard had been ascertained and paid in precise accordance with the terms of the Lands Clauses Consolidation Act, 1845, the defendant company would have acquired a legal right to execute the work which they did; and it was admitted, and in my opinion properly admitted, by Mr. Cripps in his argument that neither Lord Gerard nor any one claiming under him by an instrument executed subsequently to the assessment of compensation could have claimed any further compensation, except perhaps (as I have said) in respect of damage entirely unforeseen.

It is said, however, that the case is different where the interest is created before the assessment of the compensation, because the damage is always ascertained at the date of assessment. If, for example, a claim for damage by severance is made, and if before assessment the landowner has sold the severed portions of his property, it is said that the landowner can recover no damage for severance. This may be so; still, it does not seem to me that the case is concluded. According to this argument the right to compensation is made to depend on whether the landowner does or does not obtain compensation; but the case of *Croft* v. *London and North Western Ry. Co.* (1) appears to me to shew that the landowner, after assessment under the notice to treat, is precluded from claiming

(1) 3 B. & S. 436.

(2) 24 L. T. (N.S.) 435.

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further compensation in respect of any matter which might have been brought forward at the time of the assessment, whether it was so brought forward in fact or not. After payment of the assessed compensation the right of the promoters to execute the works, with the possible exception already stated, is absolute, and, being a legal right in the nature of an easement, prevails against legal interests created by the landowner subsequently to the assessment and payment of compensation. This being so, it is difficult to see why the right of the promoters should not prevail against a legal title derived from the landowner subsequently to the notice to treat, but before the assessment of compensation. The landowner cannot escape from the obligations imposed upon him by the notice to treat, and one of these is an obligation to bring forward and have determined all claims in respect of damage to lands of his arising from the execution of the proposed works. If, as the cases referred to shew, he can only deal with the land which he is required to give up subject to the obligations imposed by the notice to treat, I do not see why he should be permitted to disregard those obligations when dealing with land which he is not required to give up, but which may be damaged by the execution of the works.

It remains to say a few words on the special circumstances of the present case. The Act of 1886 contained a clause (s. 13) for the protection of the estates of Lord Gerard, of which sub-s. 7 was in these terms: "The company shall to the reasonable satisfaction of the owner lower all the other streets and the adjoining building land to correspond with the streets which have to be lowered to be passed under the railway and may use in making the railway the material which will have to be removed in performing these works." It appears from this sub-section that the possibility of damage to building land of Lord Gerard's by the lowering of streets was contemplated both by Lord Gerard and the defendants. By his claim of January 12, 1892, Lord Gerard did not specify any amount of compensation as claimed in respect of such damage, but did say this: "The claim is made subject to the company carrying out the provisions contained in s. 13 of the St. Helen's and

Wigan Junction Railway Act, 1886." By the agreement of October 14, 1892, Lord Gerard agreed to sell the lands by the notice to treat required to be taken for 23,000*l.*, "such sum to include all satisfaction and compensation for all damage sustained by the vendor by reason of the severing of the property purchased from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the powers of the said Acts"; but it was provided that the agreement should not (save as expressly mentioned) in anywise alter or interfere with any of the rights of the vendor under provisions contained in the defendant company's Acts of 1885 and 1886 respectively for the protection of Lord Gerard or his estate therein referred to. By the conveyance of November 27, 1894, Lord Gerard released the defendant company from the provisions of sub-s. 8 of s. 13 of the Act of 1886, but did not release them from the 7th sub-section. It therefore appears that the company and Lord Gerard came to terms (as they were entitled to do: see s. 21 of the Lands Clauses Consolidation Act, 1845) as to the amount of compensation, and that under such agreement Lord Gerard received no money payment in respect of damage to arise from the lowering of his building land, but reserved to himself the right to insist on the performance by the company of the provisions of s. 13, sub-s. 7, of the Act of 1886. It is admitted by the defendants that in accordance with that stipulation they are liable to lower the site of the plaintiff's houses if they are called on by Lord Gerard so to do; but they insist that this is the sole right of Lord Gerard or the plaintiff in respect of what they have done in the execution of the powers conferred by the Act, so far as those relate to the lowering of streets. In my opinion this contention is well founded, though unfortunately the existence of this obligation will not benefit the plaintiff. For these reasons I am unable, to my great regret, to agree with the decision of the Lord Chief Justice.

MATHEW L.J. read the following judgment:—At the time when the notice to treat was served on Lord Gerard he was entitled, in the absence of any agreement to the contrary, to require the company to lower the land laid out for building to the level of the streets mentioned in the statute. The object of imposing this obligation upon the company was to secure access to and from the streets to the houses proposed to be built on the estate. When the amount of compensation had to be settled Lord Gerard was, it seems to me, no longer in a position to require the company to perform this statutory duty, for after the notice houses had been built under leases of plots which had been granted to the plaintiff and others, and these houses the company were under no obligation to remove. It was plain that without some further agreement the buildings might lose the access to the streets when lowered, and it would have been open to Lord Gerard, when negotiating with the railway company, to put forward any claim that he had on this account. But it is clear that no such claim was made. It is not necessary to consider why. The company were not informed upon the subject and were not concerned to inquire. It may be that Lord Gerard was advised that any claim for loss of access had been transferred from him to his tenants. If this were the reason, the company, it seems to me, would be in no way prejudiced, and could not be supposed to have agreed that any part of the claim for compensation was to be reserved for future settlement. It was not disputed that if Lord Gerard had previously built the house in question he would not be entitled to demand further compensation. The case of *Croft* v. *London and North Western Ry. Co.* (1) is an authority upon this point, which does not seem to have been questioned.

But it was contended for the plaintiff that, though the owner might have no claim, his tenants were in a different position. It was said that their leasehold interests gave them a right to be compensated for a depreciation of the value of their property by the execution of the company's works. It was admitted that, after a notice to treat for land proposed to be taken by the company, the owner could not afterwards create upon it independent interests, but it was urged that this principle did not apply to adjoining land which was not taken but was injuriously affected. But if this contention were well founded,

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(1) 3 B. & S. 436.

Mathew L.J.

the company might be compelled in such a case as the present to compensate tenants, however numerous and whatever the terms of their tenancies might be. This would clearly be a position of grave hardship and difficulty to the railway company. In addition to the costs of litigating the various claims, the company might be compelled to disburse a much larger amount than the value of the landowner's interest in the premises at the date of the notice to treat. I see no reason why the principle as to land taken by the company should not apply to land injuriously affected. It was asked in argument if a landowner was to be disabled from dealing with his land in such a way as to add to the burden of the company. It seems to me that, either when the land is taken or is injuriously affected, the owner cannot derogate from the obligation created by the notice to treat. It is true that he is not deprived of the possession of the adjoining land, but it may be said to be partly taken, in the sense that a portion of its value is lost by the exercise of the company's powers. There is a partial expropriation. It was said that there was no authority for the contention of the company; and that would appear to be so, though it is probable that the claim might have been made in many cases. In my judgment, in such a case as the present, it must be regarded as a settled rule of law as between landowner and railway company that there can be but one proceeding for compensation, and that after notice to treat no onerous interest, either in the land taken or in that injuriously affected, can be created by the owner to the prejudice of the railway company. The appeal must be allowed.

VAUGHAN WILLIAMS L.J. The observation which I wish to add to the judgment of Stirling L.J. is that I cannot agree with the conclusion of the Lord Chief Justice that the agreement embodied in sub-s. 7 of s. 13 ceased by lapse of time to be of any effect after the date of the last statutory extension. I think the limit of time might be, and was, waived by Lord Gerard, in whose favour it was introduced. It is true that Lord Gerard could not by waiver enlarge the obligation of the company. He could not compel them to pull down houses built after the lapse of time, but he could in my judgment insist on the performance of the other terms of the agreement, such as the lowering of the "other streets."

Appeal allowed.

Solicitors for plaintiff: *Bell, Brodrick & Gray, for J. Haslam Fox, St. Helen's.*

Solicitors for defendants: *Maples, Teesdale & Co., for Oppenheim & Malkin, St. Helen's.*

W. J. B.

1903
Feb. 17.

THE KING *v.* THE MAYOR OF DOVER.

Municipal Corporation—Borough Fund—Resolution of Owners and Ratepayers—Demand of Poll, What amounts to—Borough Funds Act, 1872 (35 & 36 *Vict. c.* 91), *s.* 4—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *Sched. III., r.* 6.

By Sched. III., r. 6, of the Public Health Act, 1875, which schedule contains the rules as to resolutions of owners and ratepayers under the Act, it is provided that the chairman shall propose the resolution, and the meeting shall decide for or against its adoption, "provided, that if any owner or ratepayer demands that such question be decided by a poll of owners and ratepayers," the poll is to be taken in the manner therein provided. A resolution having been declared carried at a meeting of owners and ratepayers, one of the ratepayers present demanded a poll, and another rose and seconded it, "if necessary"; the latter was told by the town clerk that it was unnecessary to second the demand, which had been acceded to; the meeting then separated. Subsequently the original demand for a poll was withdrawn by its proposer, and the mayor refused to treat the action of the seconder as a demand of a poll by him. Upon an application by the second ratepayer for a mandamus to the mayor:—

Held, that the action of the applicant was in substance a demand of a poll by him within the meaning of rule 6 of the schedule.

Quære, whether the original demand for a poll could be withdrawn after the close of the meeting.

RULE NISI for a mandamus to the mayor of Dover, calling upon him to shew cause why he should not hold a poll of the owners and ratepayers of the borough. It appeared that the corporation had decided to light the town by electricity, and for that purpose to acquire the existing undertakings of an

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v.
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electric light company, and a bill had been introduced in Parliament to enable the corporation to carry out the scheme and to raise money for the purpose. Special meetings of the corporation were held under s. 4 of the Borough Funds Act, 1872, at which the necessary resolution authorizing the promotion of the bill was duly carried and confirmed; and subsequently a meeting of owners and ratepayers was held, as required by that section, for the purpose of obtaining the consent of the owners and ratepayers to the promotion of the bill. At that meeting the mayor, who presided, declared the resolution carried on a show of hands. A Mr. Bottle then demanded a poll, and the applicant, Mr. Bradley, said that he would second the demand, if necessary; whereupon the town clerk said that it was not necessary that there should be a seconder, and that the demand for a poll had been assented to; the meeting then closed. Six days after the meeting Bottle withdrew his demand for a poll, and upon the applicant insisting upon his right to have a poll taken the mayor said that he was advised that a poll could not legally be held after the withdrawal of the original demand, and therefore declined to allow a poll to be held. The present rule was then obtained.

Macmorran, K.C., for the mayor, shewed cause. The only question is whether what was done by the applicant amounted to a demand by him of a poll, and the mayor is only anxious for the question to be determined.

Danckwerts, K.C., and *Courthope-Munroe*, for the applicant, were not called upon.

LORD ALVERSTONE C.J. This rule must be made absolute. Sched. III., r. 6, of the Public Health Act, 1875, merely uses the words "if any owner or ratepayer demands that such question be decided by a poll of owners and ratepayers"; there is nothing to suggest that the demand must be in writing, or that it must be seconded. The rule must be construed with reference to the subject-matter to which it is applied. The owners and ratepayers hear the demand made, and leave the meeting thinking that a poll will be held. It is unnecessary to decide when the demand, if made by one person only, may be withdrawn. It is clear that in the present case this gentleman went to the meeting with the intention of demanding a poll, and that, when it was demanded by another ratepayer, he said that he would second it: this ought to be treated as a second demand. It would be going in the teeth of the protection afforded to owners and ratepayers by the schedule if, by reason of one person withdrawing his demand for a poll, another person who had also asked for a poll were prevented from getting one. I can see no reason why several of those present should not demand a poll. I am by no means clear that a demand for a poll can be withdrawn after the meeting has separated, but I express no opinion on the point.

RIDLEY J. I agree.

DARLING J. I am of the same opinion. Although our decision proceeds upon the ground that a demand was made by a second person, it seems to me, if it were necessary to decide the other point, that the demand for a poll could not be withdrawn after the meeting had come to an end. After the demand has been made, and the town clerk has said that a poll will be held, the other persons present would naturally remain quiet, and to allow the demand to be withdrawn privately might lead to all manner of collusion, and the owners and ratepayers might be deprived of their statutory right to a poll. Personally I am inclined to think that the demand cannot be withdrawn after it has once been accepted.

Rule absolute.

Solicitors for mayor: *Sharpe, Parker, Pritchards, Barham & Lawford, for Sir E. W. Knocker, Town Clerk, Dover.*

Solicitors for prosecutor: *Long & Gardiner, for Bradley, Dover.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 21.

MASKELYNE & COOKE *v.* SMITH.

Fraudulent Conveyance—Deed of Arrangement with Creditors—Delaying Creditors—Registration—Contents of Debtor's Affidavit—13 *Eliz. c.* 5—*Deeds of Arrangement Act*, 1887 (50 *&* 51 *Vict. c.* 57), *s.* 6, *sub-s.* 1.

A deed of arrangement with creditors, which is intended to give effect to a bonâ fide scheme of arrangement for their benefit, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, nor because some of the creditors are intentionally excluded from its operation.

A deed of arrangement is not void because the affidavit of the debtor, required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, to be filed upon the registration of the deed, does not contain the names and addresses of all the creditors.

Judgment of the Divisional Court, [1902] 2 K. B. 158, affirmed.

APPEAL of the execution creditors in interpleader proceedings from the decision of a Divisional Court (Lord Alverstone C.J., Darling and Channell JJ.) (1), reversing a decision of the deputy judge of the Westminster County Court.

The facts were in substance as follows: Early in 1900 the defendant Smith, who lived at Windsor, guaranteed in conjunction with two others the payment of the fees of the plaintiffs in respect of an entertainment given on behalf of the funds of a hospital on February 14, 1900. On May 11, 1900, the defendant executed a deed of arrangement with his creditors, under which the appellant Palmer was trustee. The deed purported to be made between the debtor of the first part, the trustee of the second part, and "the several persons, companies, and partnership firms (being creditors of the debtor) whose names and seals are affixed to the schedule hereto, or who shall otherwise in writing assent to these presents, of the third part." The deed, after reciting that it had been agreed by the parties thereto of the third part to accept an offer by or on behalf of the debtor for payment to the creditors of a composition of 20*s.* in the pound on the amount and in full discharge of their debts set out in the schedule (1) to be paid by monthly instalments of 10*l.* to the trustee, and that the composition should be secured by the assignment of the debtor's estate to the trustee, contained a covenant by the debtor to pay the 10*l.* monthly, and on demand to pay certain costs and expenses to the trustee, the sums received by the trustee from the debtor to be divided every three months among the creditors entitled thereto pro ratâ. The debtor as beneficial owner then conveyed and assigned to the trustee all his real and personal estate (except leaseholds and the necessary wearing apparel of himself and family) upon trust until default by the debtor in payment of the instalments to allow him to use, deal with, and dispose of the estate for the purposes of his business or such other purposes as the trustee might think proper, but subject to the control and supervision of the trustee, and after default by the debtor upon trust to sell and realize and apply the net proceeds, after payment of costs and expenses, to the immediate payment to the creditors of so much of the composition as then remained unpaid, and to pay the surplus (if any) to the debtor, and to assign or deliver to him the remainder of the trust estate. There was a proviso that the trustee should not be bound in any way to interfere with the debtor in the conduct of the business or in his dealing with the estate further than he should think necessary or proper, but the debtor was to conform to the trustee's suggestions or advice, and there was power to the trustee at any time to wind up the business and realize and divide the estate. The deed contained a release of the debtor by the creditors. The deed was intended by the defendant to apply only to his trade creditors, and the plaintiffs, not being trade creditors, were intentionally excluded from it.

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(1) [1902] 2 K. B. 158.

On the same day (May 11, 1900) the affidavit required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, was sworn by the defendant, the schedule containing a list of

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(1) It was stated during the argument that there was no schedule to the deed, but that there were separate assents signed by all the creditors except the plaintiffs.

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twenty-four creditors. The names of Maskelyne & Cooke, the plaintiffs, did not appear in the schedule. The deed was executed on May 11 by the defendant and the trustee, and the signatures and assents of a large majority of the creditors were then or subsequently obtained. On May 17, 1900, the deed was duly registered under the Act.

In April, 1901, the plaintiffs sued the defendant upon his guarantee in the Mayor's Court for 12*l*. 12*s*., the amount of their fees, and upon May 29 they recovered judgment for that amount and costs. Execution having been levied upon the defendant's goods, the goods seized were claimed by Palmer as trustee under the deed; an interpleader summons was taken out by the sheriff, and the interpleader proceedings transferred to the Westminster County Court. At the hearing the deputy county court judge found as facts that there was no collusion between the defendant and Palmer to defraud or delay creditors by means of the deed; that the defendant's motives were honest, but that he, not considering the plaintiffs to be business creditors, deliberately treated them as not being on the same footing as his other creditors, and that he intended to exclude them from the benefit of the deed; he therefore held the deed to be fraudulent and void under the statute of Elizabeth. He further found that the deed was void under s. 5 of the Deeds of Arrangement Act, 1887, by reason of the omission from the affidavit verifying the list of creditors required under s. 6, sub-s. 1, of the names of the plaintiffs. He therefore gave judgment in favour of the plaintiffs, the execution creditors. The trustee appealed, and the Divisional Court (Lord Alverstone C.J., Darling and Channell JJ.) allowed the appeal. (1) From that decision the execution creditors now appealed. (2)

(1) [1902] 2 K. B. 158.

(2) By 50 & 51 Vict. c. 57 (The Deeds of Arrangement Act, 1887), s. 5, a deed of arrangement is void unless registered under the Act within seven clear days after its first execution by the debtor or any creditor. By s. 6, sub-s. 1, the registration of a deed of arrangement is to be effected by filing with the registrar within seven clear days after execution "a true copy of the deed and of every schedule or inventory thereto annexed or therein referred to . . . . together with . . . . an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors."

Macaskie, K.C., and *Thorn Drury*, for the execution creditors. First, the deed was void under 13 Eliz. c. 5, because of the benefits reserved to the debtor, by reason of which it tended to defeat or delay creditors. It is unusual in form, and under it the debtor was not merely to remain in possession of the estate until default, but had power to dispose of it at his own discretion unless the trustee, who had been chosen by the debtor himself, should think fit to interfere. The deed is really for the benefit of the debtor rather than of the creditors, and is very similar to, and even more mischievous than, the deed which was held void in *Spencer* v. *Slater*. (1) The case of *Boldero* v. *London and Westminster Loan and Discount Co.* (2), which was relied upon in the Court below by the trustee, is clearly distinguishable; there the primary trust was to sell the debtor's business for the benefit of the non-assenting creditors, and not, as here, to permit the debtor to keep the business on. *Alton* v. *Harrison* (3), where a proviso that the debtor was to remain in possession for six months was held not to avoid the deed, is also distinguishable; the present deed goes far beyond that one: it gives the debtor power, not only to remain in possession, but to dispose of the property, and also contains a proviso that the trustee shall not be bound to interfere. Secondly, the deed is void by reason of the non-insertion of the names and addresses of the plaintiffs as creditors in the debtor's affidavit. Sect. 6, sub-s. 1, of the Act provides that the debtor's affidavit filed on registration is to state the names and addresses of his creditors, and by s. 7 the register is to contain certain particulars therein specified, "and any other prescribed particulars." Form No. 3, appended to the rules made under the Act, shews that the schedule to the debtor's affidavit is to contain the names and addresses of his creditors. "Creditors" means primâ facie all the creditors, and this is the view taken by Lord Esher M.R. in *In re Batten, Ex parte Milne* (4); it means at any rate all the unsecured creditors: *Chaplin* v. *Daly*. (5)

(1) (1878) 4 Q. B. D. 13.
(2) (1879) 5 Ex. D. 47.
(3) (1869) L. R. 4 Ch. 622.
(4) (1889) 22 Q. B. D. 685, at p. 694.
(5) (1894) 71 L. T. 569.

Bray, K.C., and *Pritchett*, for the claimant, the trustee, were not called upon to argue.

VAUGHAN WILLIAMS L.J. I am of opinion that the judgment of the Divisional Court was right, and should be affirmed. The question is whether this deed of arrangement is void, and the first ground upon which this is suggested is because the names of these particular creditors, the plaintiffs, are omitted from the schedule to the affidavit made by the debtor and filed at the time of the registration of the deed. I cannot agree that the omission of these particular names avoids the deed. Looking at the circumstances under which this particular debt was contracted, it is quite possible that it was omitted from the schedule on the ground that the defendant thought that it was merely a contingent liability which need not be included. The contention of the plaintiffs is dealt with in the Court below by the Lord Chief Justice, who says (1): "It was contended that the registration of the deed was void because it was not accompanied by an affidavit containing the names of all the creditors; but I think that this argument goes too far. There is nothing in the statute which makes the registration bad if there has been an honest omission of the name of a particular creditor. The language of Lord Esher M.R. and Fry L.J. in *In re Batten* (2) shews that the statute does not of necessity mean that every creditor must be included." I entirely agree with the view expressed by the Lord Chief Justice. If we look at s. 12 of the Deeds of Arrangement Act, 1887, and see what is the purpose of the registration, and consider the extent to which information is given to the creditors by that which is registered, it seems to me plain that it is not a condition precedent to the validity of the deed that the affidavit or the schedule should contain the names of all the creditors. This is a case in which it is required that the debtor shall make an affidavit in respect of these matters, not for the purpose of giving information to creditors, but for the purpose of satisfying the officer to whom the duty of registration is entrusted; and if it subsequently turns out that the name of a creditor has been omitted, I do not think that that fact standing by itself would render the deed void.

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(1) [1902] 2 K. B. at p. 162.

(2) 22 Q. B. D. 685.

Then I come to the other point, that this deed is void under the statute of Elizabeth. I am far from saying that a deed which purports to be for the benefit of creditors generally cannot be void under that statute. We must look at the deed and consider it as a whole, and if, when so considered, it appears to be not really for the benefit of the creditors, but to be a deed which is intended to enable the debtor to retain his property, or part of it, for his own benefit, it is not the less within the statute of Elizabeth because it happens to be in form a deed for the benefit of creditors. But when this deed is looked at, I see no reason at all to draw the inference that it is anything but what it purports to be—that is, a deed for the benefit of creditors—or for drawing the inference that it was intended to defeat or delay creditors by giving a benefit to the debtor. In form the deed provides for a composition of 10*l.* a month payable to all the creditors, and there is a provision that until default in payment of an instalment the trustee is to allow the debtor to use, employ, deal with, and dispose of the estate for the purposes of his business, subject to the trustee's control; then from and after default the trustee has power to come in and take possession of and realize the estate. In addition to this there is a proviso which enables the trustee, even if there has been no default, to come in and wind up and realize the estate. Under the circumstances it seems to me perfectly apparent that this is an honest deed intended for the benefit of the creditors.

With regard to the cases of *Spencer* v. *Slater* (1) and *Boldero* v. *London and Westminster Loan and Discount Co.* (2), which were cited in argument, and were also referred to in the judgments in the Divisional Court, I wish to say that, whatever may have been the correctness of the particular inference which was drawn in *Spencer* v. *Slater* (1), as far as the principle underlying that decision is concerned it cannot be questioned. In these cases the question always is, Is the deed one for the benefit of creditors, or does it seek to benefit the

(1) 4 Q. B. D. 13.

(2) 5 Ex. D. 47.

Vaughan Williams L.J.

debtor at the expense of the creditors? And, by benefiting the debtor, I mean not necessarily giving him an actual benefit, but giving him a chance of a benefit at his creditors' expense. That is the principle which I apply to the decision of the present case. I do not think that the decision in *Alton* v. *Harrison* (1) contains anything in the slightest degree inconsistent with this principle. In effect it says that, where a deed of this sort is substantially for the benefit of creditors, the Court should not draw the inference that it is fraudulent from the fact that it contains a proviso which, though favourable to the debtor, is consistent with the tenor and object of the deed.

STIRLING L.J. I am of the same opinion. As to the first question, whether the deed was fraudulent under the statute of Elizabeth, I entirely accept the law as laid down in *Alton* v. *Harrison*. (1) In his judgment in that case Giffard L.J. said (2): "If the deed is bonâ fide—that is, if it is not a a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." That being the law, the question for us is whether this deed was executed bonâ fide for the benefit of creditors, or was a mere cloak for the purpose of reserving a benefit to the grantor. For the reasons that have been given by Vaughan Williams L.J., I cannot say that it is on the face of it a mere cloak, and not a bonâ fide instrument.

Upon the second point taken by the appellants, that the omission of the names of the plaintiffs from the list of creditors required by the Deeds of Arrangement Act vitiates the deed, I agree with the decision of the Court below. The matter stands thus. The Act clearly applies to the present deed, and s. 5 makes a deed to which the Act applies void unless it is registered under the Act. Then s. 6 deals with the mode of registration, and in particular provides that a true copy of the deed, and of every schedule or inventory annexed, is to be filed with the registrar within seven clear days after execution, together with an affidavit verifying the time of execution, and an affidavit containing (inter alia) "the names and addresses of his creditors." I agree that the word "creditors" means primâ facie all the creditors. Then, by s. 7, the registrar is to keep a register in which he is to enter an abstract of the contents of every deed registered, containing certain prescribed particulars, but among those particulars there is no mention of the names and addresses of the creditors. Sect. 9 deals with the rectification of the register; s. 12 entitles any person to search the register and to inspect, examine, and make extracts from any registered deed, the extracts being, by sub-s. 2, limited to the dates of execution and of registration, the names, addresses, and descriptions of the debtor and of the parties to the deed, a short statement of the nature and effect of the deed, and any other prescribed particulars. The last words relate back to the particulars prescribed by s. 7. Then s. 19 defines "prescribed" as meaning prescribed by rules to be made under the Act. Under this Act the Deeds of Arrangement Rules, 1888, have been made, and by rule 3 the affidavits to be filed pursuant to s. 6 are to be in the forms given in the appendix, with such variations as circumstances may require, and the form of affidavit to be sworn by the debtor no doubt contains the names and addresses of the creditors. Then rule 4 provides that the abstract of the contents of any deed to be entered on the register is to be in the form in the appendix. That form contains various matters, but there is no reference to the names and addresses of creditors. It seems, therefore, that the names and addresses of creditors are not matters which, under s. 12, a creditor can require to be furnished with on inspection of the register. This has, I think, an important bearing on the question whether the omission of the name and address of a single creditor vitiates the registration and makes the deed bad. I think that it does not. I agree with the view taken by Fry L.J. in *In re Batten, Ex parte Milne* (1), that there was no intention that the system of registration should make the names and addresses of the creditors known to the public. I think that s. 6, sub-s. 1, merely prescribes what is to be done in order that a deed of

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(1) L. R. 4 Ch. 622.

(2) L. R. 4 Ch. at p. 626.

(1) 22 Q. B. D. 685, 700.

arrangement may be registered under the Act, but does not go the length of saying that, if registration actually takes place in such circumstances as the present, the deed is void.

MATHEW L.J. I am of the same opinion. In the first place the plaintiffs contend that this deed of arrangement is void because the affidavit which has to be filed by the debtor under s. 6 does not contain their names and addresses as his creditors. But the object of the registration under that section is not to give information to creditors, but to afford evidence to the registrar of compliance with the requirements of the statute. Creditors should not be allowed to found an objection on the ground of the omission of a statement which the Legislature never intended to be inserted for the purposes of registration. The honest omission of the name and address of a particular creditor ought not to, and in my opinion does not, invalidate the registration. On the other point I entirely agree with the reasons given in the judgments in the Court below.

Appeal dismissed.

Solicitors for execution creditors: *Seal & Edgelow.*
Solicitors for claimant: *Wood & Sons.*

W. J. B.

1903
Feb. 9, 16.

In re ENGLISH & AYLING.
Ex parte MURRAY & CO.

Bankruptcy—Execution Creditor—Sheriff's Fees—Possession Money—Possession by Sheriff for more than Twenty-one Days—Act of Bankruptcy—"Costs of Execution"—Bankruptcy Act, 1890 (53 *&* 54 *Vict. c.* 71), *ss.* 1, 11, *sub-s.* 1.

On March 12, 1902, the sheriff levied under a fi. fa. on the goods of a debtor, and, at the request of the execution creditor and of the debtor, remained in possession. On April 3 the debtor committed an act of bankruptcy by the sheriff having been in possession for twenty-one days. On May 16 a receiving order was made against the debtor whereby the title of the trustee in bankruptcy related back to April 3. The sheriff withdrew on May 29:—

Held, that the sheriff's possession money for the period beyond April 3 was not "costs of the execution" within s. 11 of the Bankruptcy Act, 1890, as against the trustee in bankruptcy.

THIS was an application that raised a question as to the right of the sheriff to possession fees, under these circumstances.

On March 12, 1902, the sheriff levied execution on the goods of the debtors under a fi. fa. issued by a judgment creditor for 3092*l*. 3*s*. 10*d*. Negotiations ensued, and by arrangement, and at the request of the judgment creditor and of the debtors, the sheriff remained in possession.

On May 8, as the parties could not agree, the sheriff was instructed to sell; but on May 16 a receiving order was made against the debtors on their own petition. The same day the official receiver gave the sheriff notice of the receiving order, but made no request to him to deliver up the goods until May 29; and the sheriff remained in possession until that day, when he sold goods under the fi. fa. to the extent of 120*l*. and withdrew.

In due course the sheriff carried in his charges for taxation, and claimed possession money from March 12 to May 29—a period of seventy-eight days. The taxing master only allowed him possession money for the twenty-one days from March 12 to April 3, on the ground that on April 3 the debtors committed an act of bankruptcy by the seizure of their goods and the holding thereof for twenty-one days, and that the title of the trustee in bankruptcy related back to that date.

This was a motion by the sheriff to review the taxing master's decision.

Muir Mackenzie, for the motion. The sheriff is the mandatory of the execution creditor and is bound to carry out his instructions, and, when he remains in possession for more than twenty-one days at the request of the execution creditor and of the debtor, he has a charge on the goods for all his reasonable costs incurred in preserving the goods for the benefit of the estate. Under s. 11 of the Bankruptcy Act, 1890, the words "costs of the execution" mean all costs reasonably incurred by the sheriff before he has notice of a receiving order, although he may have notice of an act of bankruptcy which may defeat his levy: *In re Harrison* (1); *In re Hurley* (2); *In re Beeston.* (3)

S. G. Lushington, for the Board of Trade. The cases cited are distinguishable, and the observations in the judgments in *In re Beeston* (3) are against the motion. An available act of bankruptcy was committed on April 3, and, as a receiving order was made within three months from that date, the title of the trustee in bankruptcy relates back to that date. The costs of the prolonged possession of the sheriff after April 3 cannot be "costs of the execution" as against the trustee in bankruptcy, who did not consent to his remaining in possession.

Muir Mackenzie, in reply.

Feb. 16. Wright J. The question in this case arises under the 11th section of the Bankruptcy Act of 1890, which says in sub-s. 1: "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." Now here on March 12 last year there was a fi. fa., and possession was kept by the sheriff till May 29, that is, nearly two months and a half, at the direction of the creditor and with the consent of the debtor, that consent being given from the very first. On May 8 the creditor instructed the sheriff to sell. On May 16 a receiving order was made against the debtor on his own petition, and notice of it was served by the official receiver on the sheriff, and on May 29 the official receiver told the sheriff to withdraw. The sheriff claims possession money from March 12 to May 29. The taxing officer has held that the sheriff is only entitled under the section to have a charge on the goods or their proceeds for twenty-one days after possession taken, a period which ends on April 3, there having been an act of bankruptcy on completion of the twenty-one days. It seems to me that the costs of keeping possession, after the proper time for sale or other completion of the execution, are not costs of the execution as against a creditor unless the creditor has consented to the prolongation of the possession. Clearly, in an ordinary case, a mere belief on the part of the sheriff that the creditor has consented to the prolongation of the period of possession is not sufficient to entitle the sheriff to charge the judgment creditor with the costs of the prolonged possession. Now here I think the case must be treated as if, at the date to which the title of the subsequently appointed trustee in bankruptcy related back, the trustee became the creditor by operation of law. He must now be regarded as having then become, as it were, the creditor, and he never consented to the sheriff continuing in possession. I think, therefore, that as against him the costs of the prolonged possession are not "costs of the execution" within the meaning of the section. I think the sheriff's remedy, if any, is against the actual judgment creditor, for whose benefit, or at least at whose request, the expense has been incurred. The remedy is not against the estate, which has not been benefited in any way by the prolonged possession.

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(1) (1893) 10 Morr. 106.

(2) (1893) 10 Morr. 120.

(3) [1899] 1 Q. B. 626.

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ENGLISH & AYLING, *In re.* MURRAY & Co., *Ex parte.*

I think, therefore, that the taxing officer was in substance right. The motion must be dismissed with costs.

Solicitors for sheriff: *Parker, Garrett & Co.*
Solicitor for trustee: *Solicitor to the Board of Trade.*

H. L. F.

[IN THE COMMERCIAL COURT.]

1903
March 4, 9.

SHILLITO *v.* BIGGART AND ANOTHER.

Ship—Mortgage—Mortgagee taking Possession—Right to Freight previously Earned but Unpaid.

A mortgagee of a ship is not entitled to unpaid freight which became due previously to the date of his taking possession of the ship.

INTERPLEADER ISSUE tried in the Commercial Court.

In October, 1900, Woodruff, Shillito & Co., the owners of the steamship *Craigearn*, executed a statutory mortgage of the vessel in favour of Biggart & Fulton. In August, 1902, the owners being in default as mortgagors, Biggart & Fulton as mortgagees procured the arrest of the vessel at Hull in a mortgage action in the Admiralty Court. A decree in that action was pronounced in the mortgagees' favour in December, 1902, and under that decree the vessel was sold. After allowing for the receipt by the mortgagees of the purchase-money (less expenses of sale) and of the balance of freight earned on the homeward voyage (then in court), there still remained a balance of 1000*l.* due to the mortgagees.

Previously to the date of the arrest of the vessel, namely, on June 17, 1902, there had become due to the owners from Cory Brothers as charterers, or from the Brazilian Coal Company as consignees of cargo, a sum of 527*l.* 9*s.* 11*d.*, balance of freight in respect of the vessel's outward voyage from Cardiff to Santos. At the date of the arrest this sum was still unpaid. It was claimed by Biggart & Fulton as mortgagees in possession, and by Edwin Shillito as assignee for good consideration of Shillito, Woodruff & Co., under an assignment dated November 24, 1902.

Cory Brothers and the Brazilian Coal Company interpleaded, and it was ordered that an issue should be tried, in which Edwin Shillito was plaintiff and Biggart & Fulton were the defendants, to determine the property in this unpaid balance of freight.

J. A. Hamilton, K.C., and *Loehnis*, for the plaintiff. A mortgagee of a ship on taking possession is only entitled to receive unpaid freight which has been or will be earned on the voyage during which he takes possession. Any freight earned previously to that voyage, though unpaid at the date of taking possession, remains the property of the mortgagor. In the present case the mortgagees have rightly received the freight earned on the homeward voyage, but they are not entitled to be paid this balance of freight which had been earned on the previous outward voyage, and which was due, though unpaid, at the date when the mortgagees took possession. The issue should, therefore, be determined in favour of the plaintiff as assignee of the owners: *Chinnery* v. *Blackburne* (1), *Keith* v. *Burrows* (2); *Liverpool Marine Credit Co.* v. *Wilson* (3); *Collins* v. *Lamport*. (4)

Pickford, K.C., and *Joseph Hurst*, for the defendants. A mortgagee of a ship by the act of taking possession succeeds to all the rights of the owner, and, therefore, if he intervenes at any time before the freight has been paid, he is entitled to receive the outstanding freight, although it may in fact have become due previously. The law on this subject is thus stated in Robbins and Maw on the Law of Mortgages, p. 266: "It was formerly considered that the mortgagee could not recover freight already earned previous to his taking possession; but the rule now appears to be settled that the mortgagee on taking possession is entitled to all freight then unpaid, whether previously earned or not." This statement of the law is borne

(1) (1784) 1 H. Bl. 117, n.; 2 R. R. 721.

(2) (1877) 2 App. Cas. 636.

(3) (1872) L. R. 7 Ch. 507.

(4) (1864) 4 D. J. & S. 500.

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out by the authorities: see *Rusden* v. *Pope* (1); *Brown* v. *Tanner* (2); *The Benwell Tower* (3); *Japp* v. *Campbell.* (4) A mortgagee of land on taking possession can recover all back unpaid rents as well as the rents then accruing, and a mortgagee of a ship is in an analogous position with regard to unpaid freight: *Wilson* v. *Wilson.* (5)

Hamilton, K.C., in reply. In all the cases cited for the defendants the freight claimed was being earned on the voyage during which possession was taken by the mortgagee, and any observations in these cases apparently enlarging the rights of the mortgagee are merely dicta.

Cur. adv. vult.

March 9. WALTON J. read the following judgment:—In this interpleader issue the question is whether a sum of 527*l.* 9*s.* 11*d.*, which is in court, is the property of the plaintiff or of the defendants. The sum in question is a balance of freight which became due from the Brazilian Coal Company, Limited, to Woodruff, Shillito & Co., who were the owners of the steamship *Craigearn*, in respect of the carriage of a cargo of coals to Santos by such steamship. This balance of freight was earned and became due and payable on June 17, 1902. The plaintiff claims it as the assignee of the shipowners, Messrs. Woodruff, Shillito & Co. The defendants dispute his claim, and contend that they are entitled to the money in question as mortgagees of the steamship by a mortgage dated October 11, 1900. After discharging her cargo of coals at Santos the steamer loaded a cargo in the river Plate for Hull, where she arrived on August 14, 1902, and on her arrival the defendants entered into possession of the steamship as mortgagees. Although the freight in question had become due on June 17, it had not been paid when the mortgagees entered into possession on or about August 14, 1902.

The defendants contend that they are entitled to all freight earned by the vessel and unpaid at the time when they entered

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(1) (1868) L. R. 3 Ex. 269.

(2) (1868) L. R. 3 Ch. 597.

(3) (1895) 72 L. T. 664.

(4) (1887) 57 L. J. (Q.B.) 79.

(5) (1872) L. R. 14 Eq. 32.

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Walton J.

into possession. The plaintiff, on the other hand, contends that, although the defendants are entitled to freight which became due after they took possession, they are not entitled to freight which became due and payable before, although it may not have been paid until after, they took possession.

It is somewhat surprising to find that the question which arises in the present case has not been settled by an express decision in some reported case. I am not satisfied that *Chinnery* v. *Blackburne* (1) is precisely in point. The judgment of Parker V.-C. in *Cato* v. *Irving* (2) proceeds upon the assumption that the mortgagee of a ship is not entitled to freight unless he takes possession before the freight has accrued due. He says (3): "The authorities referred to in the argument establish that the mortgagee of a ship, who takes possession before the conclusion of the voyage, is entitled to the then accruing freight. It was contended by the defendants, that the present case does not come within this rule, because the plaintiffs did not take possession until the ship was in the Docks, and the voyage therefore concluded. I consider that a mortgagee who takes possession of the ship at any time before the cargo is discharged, comes within the rule. The right to the freight does not accrue until the goods are not only conveyed to their destination, but are also delivered; and a mortgagee who takes lawful possession of the ship while the goods are still on board, and is thereby entitled to deliver the goods and receive the freight, to the exclusion of the mortgagor, must be as much within the reason of the rule when the ship is in the Docks, as where she is only on her way to the Docks at the time when possession is taken." This was in 1852. In *Brown* v. *Tanner* (4) the Lords Justices in the year 1868 had to deal with a question as to a mortgagee's right to freight. In delivering the judgment of the Court Page Wood L.J. said (5): "It appears to us that this case must be determined in the appellant's favour on the ground of his having taken possession of the ship before the freight under the charterparty had become due. It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken." The defendants rely upon the last sentence in this passage of the judgment as indicating that, in the opinion of the Lord Justice, the mortgagee on taking possession became entitled to all freights then due and unpaid. I think, however, that the Lord Justice meant no more than that the mortgagee on taking possession became entitled to all unpaid freight which the ship was then in the course of earning. This seems clear from what follows in the judgment. The Lord Justice says (1): "The only question, then, really is, had the freight become due when the appellant took possession? And this point we wished to have reargued—the matter not appearing to have been fully discussed either in the Court below or at the first hearing before us." And the Lord Justice proceeds to consider this question, and comes to the conclusion that the freight had not been earned before the mortgagee took possession, and that, therefore, the mortgagee was entitled to it.

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(1) 1 H. Bl. 117, n.; 2 R. R. 721.

(2) (1852) 5 De G. & Sm. 210.

(3) 5 De G. & Sm. at p. 224.

(4) L. R. 3 Ch. 597.

(5) L. R. 3 Ch. at p. 602.

In the *Liverpool Marine Credit Co.* v. *Wilson* (2) James L.J., in delivering the judgment of himself and Mellish L.J., stated the law upon this subject as follows: "He" (the mortgagee) "had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession, or, according to a recent decision in the Court of Exchequer, if he took constructive possession of the ship before the freight was actually earned, he thus became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops." In *Keith* v. *Burrows* (3) Lord Cairns, as I understand him, states the law to the same effect at p. 646, and Lord Blackburn at the top of p. 660; and in *Anderson* v. *Butler's*

(1) L. R. 3 Ch. 597, at p. 603.

(2) L. R. 7 Ch. 507, at p. 511.

(3) 2 App. Cas. 636.

Wharf Co. (1) Hall V.-C. stated the result of the decisions as follows: "In the case of a mortgagee of a ship . . . . the mortgagee is not entitled to the earnings of a ship, except the earnings thereof after the time of his taking possession." The defendants relied upon certain dicta of Malins V.-C. in *Wilson* v. *Wilson* (2); but when carefully considered the language of the Vice-Chancellor does not appear to me to be really inconsistent with the statements of the law to which I have already referred. In the present case it is admitted that the freight became due and payable before the defendants entered into possession, and for this reason I think that the defendants' claim fails, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

Solicitors for plaintiff: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants: *E. F. Turner & Sons.*

(1) (1879) 48 L. J. (Ch.) 824, at p. 828.

(2) L. R. 14 Eq. 32.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 19.

THE BRITISH OIL AND CAKE MILLS, LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Mortgage — Trust Deed for securing Debenture Stock— Security auxiliary or by way of further Assurance—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *First Schedule, " Mortgage, &c."* (2.).

A limited company, upon the issue of debenture stock, by deed entered into with trustees for the holders of the stock, acknowledged that the company was indebted to the trustees to the amount of the stock, and agreed to convey to the trustees certain freehold property, not at the time in the possession of the company, and power was given to the trustees to enforce payment by foreclosure. The company subsequently acquired the property and conveyed it to the trustees upon the trusts and purposes and subject to the provisions of the trust deed. Stamp duty was paid on the trust deed under the 1st schedule to the Stamp Act, 1891, title "Mortgage, &c.," clause 2, on the amount of the debenture stock. The Commissioners assessed the duty on the second deed under the same schedule, clause 2, at 6*d.* per cent. on the amount of the debenture stock. On appeal:—

Held, that the deed of conveyance was liable to the duty assessed by the Commissioners as a mortgage "being an auxiliary security or by way of further assurance" for the repayment of money "where the principal or primary security is duly stamped."

Appeal from a judgment of Phillimore J. on a case stated by Commissioners of Inland Revenue.

By an indenture dated October 3, 1899, and made between the appellants, the British Oil and Cake Mills, Limited, of the one part, and certain persons therein called "the present trustees" of the other part, it was recited that the company had determined to issue debenture stock to be constituted and secured in manner thereinafter provided.

Clause 2 of the deed stated: "The company hereby acknowledges that it is indebted to the present trustees in the sum of 750,000*l.*, carrying interest at the rate of 4¼ per cent. per annum . . . ." And by the same clause payment of interest to the stockholders was to operate in satisfaction of the interest payable to the trustees.

By clause 3 the stockholders were to be regarded as beneficial owners of their respective shares of the stock.

C. A.
1903

British Oil and Cake Mills, Limited v. Inland Revenue Commissioners.

Clause 8: "The company as beneficial owners shall with all convenient speed grant unto the present trustees all and singular the freehold hereditaments respectively specified or referred to in the first part of the 2nd schedule hereto, to hold the same unto and to the use of the present trustees, their heirs and assigns."

By clause 13 the company created a floating charge on general assets in favour of the trustees.

By clause 14 the trusts of the mortgaged premises were declared, and power was given to the trustees, upon the security thereby constituted becoming enforceable as thereinafter provided, to enter upon or take possession of the mortgaged premises and to sell the same.

By clause 15 the security constituted by the deed was to become enforceable on default in payment by the company of principal or interest, if the company should be wound up, if a receiver should be appointed in a manner prejudicial to the security, if the company should attempt to create a mortgage ranking in priority to the security, and on default by the company in performing the obligations of the security.

Clause 22: "At any time before the security hereby constituted becomes enforceable, the trustees or trustee may upon the application and at the expense of the company, but only if and so far as in their or his opinion the interests of the stockholders shall not be prejudiced, thereby do or concur in doing all or any of the things following in respect of the specifically mortgaged premises—that is to say . . . . : (10.) May call in and enforce payment by foreclosure or otherwise of the securities forming part of the specifically mortgaged premises."

By clause 24 the company might, during the continuance of the security before it became enforceable, exercise the powers of leasing and ancillary powers given by s. 18 of the Conveyancing and Law of Property Act, 1881, to a mortgagor in possession.

By clause 25, after the trustees should have taken possession, and until the whole of the mortgaged premises should be sold, called in, collected, and converted, they were empowered to carry on the business of the company.

By clause 28 the trustees were empowered to appoint a receiver of the mortgaged premises.

By clause 32 the company were bound at all times, after the security became enforceable, to execute all assurances that the trustees might reasonably require for facilitating the realization of the mortgaged premises, including the execution of transfers, conveyances, assignments, and assurances to the trustees or their nominees.

By clause 33 the company appointed the trustees their attorneys to execute any assurances which the company ought to execute.

Clause 48: "Upon proof being given to the reasonable satisfaction of the trustees or trustee that the holders of all the stock entitled to the benefit of the trusts herein contained and for the time being issued have been paid off or satisfied, and upon payment of all costs, charges, and expenses incurred by and the remuneration of the trustees or trustee in relation to these presents, the trustees or trustee shall at the request of the company reconvey or reassign to the company the mortgaged premises, or such part thereof as may remain vested in them or him freed and discharged from the trusts herein contained, or otherwise release the mortgaged premises from this security."

By a definition in clause 1 the specifically mortgaged premises included the freehold hereditaments covenanted by clause 8, above set out, to be assured; and the first part of the 2nd schedule contained among other entries the following: "Thirdly, all the seed-crushing mills and other freehold premises connected therewith, situate at Kingston-upon-Hull, which belong or lately belonged to Edwin Robson, but are now under contract for purchase by the company." The question that was submitted to the Commissioners was as to the stamp duty payable on a deed which conveyed to the trustees the property mentioned in the third clause of the schedule above set out.

By this deed, dated November 21, 1899, made between the company and the trustees of the deed of October 3, 1899, it was recited that the instrument in recital was supplemental to the former deed, thereinafter referred to as the "trust deed."

It was recited that the freehold hereditaments thirdly specified in the 2nd schedule to the trust deed had been conveyed to the company by an indenture particulars whereof were contained in the schedule to the deed now in recital, and it was witnessed that, "in pursuance of the provisions in that behalf contained in the trust deed, the company as beneficial owner hereby conveys unto the present trustees and their heirs all and singular the freehold hereditaments thirdly specified or referred to in the first part of the 2nd schedule to the trust deed. And all other (if any) the freehold hereditaments comprised in the indenture, particulars whereof are contained in the schedule hereto. To hold the same unto and to the use of the present trustees, their heirs and assigns, for ever, upon and for the trusts and purposes and subject to the provisions of the trust deed, nevertheless if and so far as in the first part of the 2nd schedule to the trust deed or in the said indenture the same premises are mentioned to be subject to any covenants, exceptions, or other matters, then subject thereto.

"In witness whereof the company hath caused its common seal to be hereunto affixed, and the other parties have hereunto set their hands and seals the day and year first above written.

THE SCHEDULE.

Reference to Hereditaments specified or referred to in Part I. of the Second Schedule to the Trust Deed.	Date of Indenture.	Parties.
Hereditaments thirdly specified or referred to.	20th November, 1899.	Edwin Robson of the first part, John Richard Bartlett and Chadwick & Company, Limited, of the second part, The British Oil and Cake Mills, Limited, of the third part.

The case stated that this instrument was executed in pursuance of the provisions of the mortgage of October 3, 1899; that the premises therein referred to in the trust deed as "specifically mortgaged premises" were the premises of the various firms and companies which were amalgamated in the British Oil and Cake Mills, Limited; and that the instrument now in question was one of several instruments executed in pursuance of the provisions of clause 8 thereof.

The mortgage of October 3, 1899, had been presented to the Commissioners, and adjudged by them liable to the duty of 2*s.* 6*d.* on the sum of 750,000*l.* by reference to the heading "Mortgage" in the 1st schedule to the Stamp Act, 1891 (1), and this duty was paid and no objection made against the assessment.

The Commissioners, being of opinion that the instrument submitted to them was liable to the duty of 6*d.* per cent. on 750,000*l.* by reference to the heading "Mortgage" in the 1st schedule to the Stamp Act, 1891, sub-heading (2.), so assessed it, and this duty, namely, 187*l.* 10*s.*, was paid.

The appellants, being dissatisfied with the assessment, required the Commissioners to state a case.

The questions for the opinion of the Court were—

(i.) Whether the instrument was chargeable with the duty of 187*l.* 10*s.* according to the assessment of the Commissioners.

(ii.) If not, with what duty the instrument was chargeable.

The case came on for hearing before Phillimore J., who decided in favour of the respondents on the authority of *Gartsides* v. *Inland Revenue Commissioners.* (2)

The appellants appealed.

Danckwerts, K.C., and *H. E. Richards*, in support of the appeal. The trust deed is not a mortgage within s. 86, sub-s. 1, of the Act, for it does not contain the usual powers of redemption. The security really relates to the debenture

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(1) 54 & 55 Vict. c. 39, First Schedule: "Mortgage, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty) . . . .

"(1.) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money . . . . exceeding 300*l.*: For every 100*l.*, 2*s.* 6*d.*

"(2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped: For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured, 6*d.*"

(2) (1900) 82 L. T. 686.

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stock, and there is an obligation to reconvey when that is paid off. If it is to be regarded as a mortgage, it created a present charge on the property of the company, and contained an agreement that the trustees should have a conveyance of the legal estate of the freehold property. The conveyance of the legal estate was mere machinery for completing the charge, and is liable only to a duty of 10*s.* under the heading in the schedule "Conveyance or Transfer of any kind not hereinbefore described." In *United Realization Co.* v. *Inland Revenue Commissioners* (1) Wills J. pointed out that the question was whether the instrument was meant to give an immediate charge; and that is not done by the deed of November 21. The deed must be a mortgage to be chargeable with duty under the heading "Mortgage, &c.," and it must be a security, in the words of that clause, for the "payment or repayment of money." The judgments of Collins J. in *Jones* v. *Inland Revenue Commissioners* (2), of Rigby L.J. in *City of London Brewery Co.* v. *Inland Revenue Commissioners* (3), and of A. L. Smith L.J. in *National Telephone Co.* v. *Inland Revenue Commissioners* (4), shew that a security must be something that contains in itself an obligation to pay money. The case of *Gartsides* v. *Inland Revenue Commissioners* (5), on the authority of which this case was decided in the Court below, was decided, not on the true meaning of the language of the schedule to the Stamp Act, but by putting a popular meaning on the words. By the Stamp Act the Legislature have said that a duty of 2*s.* 6*d.* per cent. is to be imposed on a mortgage; but as there are sixteen properties in the schedule to the trust deed, the duty payable will amount to 10*s.* 6*d.* instead of 2*s.* 6*d.*, if the view taken by the respondents is upheld. In the Finance Act, 1899, s. 8, sub-ss. 2 and 3, in the case of loan capital the Legislature recognise that duty should not be paid twice over, and, if the stamp duty has been paid on the trust deed or other document securing the loan capital, it is not payable on the statement of the amount proposed to be secured. So in s. 87, sub-s. 5, of the Stamp Act, 1891, where copyhold lands are mortgaged together with other property, the ad valorem duty is to be paid on the instrument relating to the other property, and only a 10*s.* duty is to be paid in respect of the copyholds. The principle is that one duty only is payable where in fact there is one security. So in the case of an agreement for a lease and a lease in pursuance of the agreement one duty only is payable, and the same rule holds in the case of settlements.

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(1) [1899] 1 Q. B. 361.
(2) [1895] 1 Q. B. 484, at p. 494.
(3) [1899] 1 Q. B. 121, at p. 138.
(4) [1899] 1 Q. B. 250, at p. 258.
(5) 82 L. T. 686.

Sir E. H. Carson, S.-G. (with him *S. A. T. Rowlatt*), for the Crown. [He was called on only as to the question under what words the deed was liable to duty, assuming it to be a mortgage.] The deed falls within the words of the schedule either as auxiliary to the trust deed or as a security by way of further assurance. When the trust deed was executed in October the company were not in possession of the property, the conveyance to them being dated, as appears in the deed of November 21, on the day before the execution of that deed. Directly they obtained the property they were called on to execute this further deed; but their position was different to that in which they were when the trust deed was executed.

Vaughan Williams L.J. The question we have to decide is whether a duty of 6*d.* per cent. is payable in respect of this deed of November 21, 1899. The ground upon which it is said to be payable is that the conveyance falls within the second clause under the heading "Mortgage, Bond, Debenture, Covenant" in the schedule to the Stamp Act, 1891. The words are: "Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped." It is said on the other side that the conveyance is not within those words, because the conveyance itself creates no obligation to pay or repay the money, and there is no primary security to which it can be a collateral, or auxiliary, or additional, or substituted security. That being the argument, we have to look in the first place at the trust deed of October 3, 1899.

It is said that that trust deed is not a mortgage within s. 86, sub-s. 1, of the Act, the words of which are: "The expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid." In my judgment the trust deed does constitute a mortgage within that definition; and if I am asked within what words I bring it, the answer is that it is a security for payment of a definite sum of money previously due and owing. I say that because in clause 2 of the trust deed I find that the company thereby acknowledged that it was indebted to the trustees in the sum of 750,000*l.*, carrying interest at the rate of 4¼ per cent. per annum. It seems to me, therefore, that the trust deed constitutes a security within s. 86, sub-s. 1; and that being so, I have to consider whether, there being this primary security, the conveyance of November, 1899, constitutes a collateral security within the terms of the schedule.

In this particular case it seems to me that, having regard to the facts that the Solicitor-General pointed out, there is no real difficulty as to what should be our decision, because it is plain on those facts that at the time of the execution of the trust deed the company had not acquired the property, since, as appears by the schedule to the conveyance, it became theirs by a deed of November 20, more than a month after the date of the trust deed. It seems to me to be, under these circumstances, impossible to say that this conveyance of November 21, 1899, does not come within the words of the schedule. It is to be observed that the effect of this conveyance was to give to the trustees an improved security and a much better position, because they could more easily deal with their property, the subject of the trust deed. I agree with the Solicitor-General that it does not make much difference whether this conveyance is called an auxiliary or an additional security, or a security by way of further assurance. Speaking for myself, I am not prepared to say that, in every conceivable case in which there is an agreement which covers one security, and involves the legal conveyance of the property, this duty of 6*d.* per cent. would become payable. It is sufficient for present purposes to say that it seems to me that in this case there cannot be a doubt that the duty is payable. The appeal, therefore, fails, and must be dismissed.

STIRLING L.J. I am of the same opinion. I do not think that it is necessary to say under what specific head the trust deed has been stamped with an ad valorem duty under the heading "Mortgage" in the schedule to the Stamp Act. It has already been stamped as a primary security for the repayment of money, but, if it were necessary to come to a conclusion upon the matter, I should say that it had been properly stamped as a mortgage for the reasons given by my Lord. As to the document that is in question in this case, it is to be observed that what was apparently contemplated by the parties to the trust deed was that it should be an instrument which would confer on the trustees the ordinary rights of mortgagees. I find that by clause 22, sub-clause 10, of the trust deed it is provided that the trustees may enforce payment by foreclosure or otherwise of the securities forming part of the specifically mortgaged premises. It was, therefore, contemplated that the instrument with which we are now dealing should be one that would entitle the trustees, amongst other things, to the ordinary remedies of mortgagees by foreclosure in respect of the property conveyed.

It is contended on behalf of the Crown that this instrument is a security collateral or auxiliary to the previous deed, or by way of further assurance. It seems to me to be a security by way of further assurance for the purpose mentioned in the schedule to the Stamp Act; but it is urged against this view that it cannot be a security by way of further assurance, because the term "security" used in this clause of the schedule has been held to have a peculiar meaning. I think the inference that is sought to be drawn from the decisions, and especially from *Jones* v. *Inland Revenue Commissioners* (1) and *National Telephone Co.* v. *Inland Revenue Commissioners* (2), is not valid to that extent. It certainly has been decided in those cases that

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(1) [1895] 1 Q. B. 484.

(2) [1899] 1 Q. B. 250.

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the term "security" includes an instrument by which the obligation to pay is originally created. I have used the words of A. L. Smith L.J. in dealing with the last-mentioned case (1); but I do not think it was decided by those cases that in every place in which the word "security" occurs in the Act it is limited to that meaning. It seems to me that, where the context warrants the conclusion, it is used as referring to that sort of instrument which the present Master of the Rolls in *Jones* v. *Inland Revenue Commissioners* (2) describes as being in its nature collateral—something that secured a right already acquired under some other instrument or power. If that be the nature of a collateral security, it seems to me that this document which we have before us falls within the definition, and certainly, as I have already said, it is an instrument by way of further assurance.

In that view of the case the only question which remains is—whether there is a sufficient context in the present case to justify us in saying that it is used in that meaning. It seems to me that there is ample ground for taking that view. The first clause under the head "Mortgage" deals with instruments which are described as "only a principal or primary security." The second clause deals with another class of instruments described as "collateral, or auxiliary, or additional, or substituted security," or "security by way of further assurance," and I cannot think that the Legislature meant in such cases to exclude from taxation instruments which, in the words of the Master of the Rolls, secure rights already acquired, unless they contain a further obligation of some sort on the part of the borrower to repay the money. I think also that the provisions of s. 87, sub-s. 5, which were referred to in the argument, shew that this view of the intention of the Legislature is right; because a common form of security is one in which a mortgage is created of property which consists partly of freeholds and partly of copyholds. The common form of such a mortgage deed is to convey the freeholds in the ordinary way to the mortgagee subject to a proviso for redemption, and to insert a covenant for the surrender of the copyholds to the

(1) [1899] 1 Q. B. 250, at p. 258.

(2) [1895] 1 Q. B. 484, at p. 494.

mortgagee, and then, inasmuch as the legal title in the copyholds would not pass to the mortgagee, to execute contemporaneously a formal conditional surrender of them to the mortgagee by way of additional or further security. Upon the meaning which I attach to clause 2 of the portion of the schedule under the heading "Mortgage," such an instrument would have to pay ad valorem duty at the rate of 6*d.* on every 100*l.* The Legislature has thought fit to say in sub-s. 5 of s. 87 that, where any copyhold lands are mortgaged, together with other property, for securing the same money, "the ad valorem duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than 10*s.*" I read that as meaning that ad valorem duty is chargeable at the rate of 6*d.* in the 100*l.*, and is payable where the amount falls short of 10*s.*, but that where it would exceed 10*s.*, then that sum only is to be charged. That is a provision put into the statute to meet a case that commonly occurs; and it seems to me that the contention in the present case is an attempt, without any such special clause applicable to the case, to obtain the same relief.

For these reasons I think that the appeal fails, and should be dismissed.

Mathew L.J. I am of the same opinion. This deed is unquestionably a security for the payment of money; but it is said that is not enough, and that it must be a mortgage within the description contained in the schedule as a security for the payment or repayment of money. When I read the language of s. 86 it appears to me that the deed falls within the description there given as "a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing." Turning to the trust deed of October 3, 1899—the primary security—by clause 2 the company "acknowledges that it is indebted to the present trustees in the sum of 750,000*l.*" That constitutes a security within the language of

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s. 86, and, as now appears, it was a security upon property to which the company had only an equitable title. It is likely, therefore, that the deed would be found to contain provisions with regard to that state of things, and accordingly clause 8 entitles the trustees to call for a conveyance of the premises specified in the schedule, and they obtained under that clause the indenture of November 21, 1899. I see no ground for doubting that this deed was auxiliary or by way of further assurance to the trust deed. The original arrangement did not in itself put the trustees in a position conveniently to deal with the property, and accordingly it was provided that they should, by subsequent deeds, be placed in that position; and that has been done in respect of this particular property by the deed of November 21. It would follow that the deed, which is auxiliary to the trust deed or by way of further assurance, would be liable to the tax of 6*d.* in the 100*l.* specified in the schedule. The trust deed is a mortgage; the subsequent document is a security auxiliary or additional to the original deed, or by way of further assurance; and the language of the Act, notwithstanding the argument that has been addressed to us as to the word "security," as to which I will add nothing to what has been already said, is perfectly plain; and under these circumstances I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Stow, Preston & Littelton.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

A. M.

MITCHELL, APPELLANT; CRAWSHAW, RESPONDENT.

1903
March 25.

Criminal Law—Sale of Intoxicating Liquor to Children—Vessel not properly Sealed—Evidence—Gummed Paper Label—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

The appellant was charged under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, with selling beer to a child under fourteen, the beer not being sold in a sealed vessel. It was proved that a gummed paper label was affixed over the screw stopper of the bottle, extending about an inch down two sides of the neck of the bottle. The label was dry at the time of the sale, but by moistening the label with the tongue and so damping the gum the label could be removed without its being torn. The justices found that the bottle was not sealed as required by the Act, and convicted the appellant:—

Held, that there was evidence to support the finding of the justices.

CASE stated by the justices of the East Morley division of the West Riding of Yorkshire.

An information was preferred by the respondent against the appellant under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901 (1), for selling beer to a person under the age of fourteen, the beer not being sold and delivered in a corked and sealed vessel.

The following facts were proved or admitted: The appellant was a grocer and beer retailer at Shipley. On March 30, 1902, Edith Leak, aged seven years and ten months (whose parents resided almost opposite the appellant's shop), was seen to leave the appellant's shop with a pint bottle of beer. The appellant's daughter admitted that she had supplied Leak with the bottle, which was full of beer and had a screw stopper. Over this stopper was placed a gummed paper label, which was also continued about an inch down two sides of the neck of the bottle. The label was quite dry at the time when the bottle was supplied to Leak and firmly adhered to the neck of the bottle. At the hearing before the justices a policeman produced a bottle obtained from the appellant which was identical in character with that supplied to Leak, and was bearing over the stopper a gummed paper label exactly the same as that supplied to Leak. The officer stated that he had withdrawn the stopper of this bottle and replaced it without destroying the label or shewing signs of removal in three or four minutes by damping the label with his tongue and so softening the gum that the label was taken off without tearing. The policeman repeated the operation in Court. The appellant's solicitor submitted that the object of the Act was the protection of children, and that though it was possible for a skilled police officer to remove the label and draw the stopper without destroying the label, such an act would be impossible for a child. The appellant's solicitor further contended that the label as affixed was a seal within the meaning of the Act, but he offered no evidence.

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(1) 1 Edw. 7, c. 27, s. 2: "Every holder of a licence who knowingly sells or delivers or allows any person to sell or deliver . . . . intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold and delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty . . . ."

Sect. 5: "The expression 'sealed' means secured with any substance without the destruction of which the cork, plug or stopper cannot be withdrawn."

The magistrates found as a fact that the bottle had a screw stopper over which was placed a perfectly dry gummed paper label, which was continued about an inch down two sides of the neck and adhered thereto; but they were of opinion that in the circumstances the bottle was not secured and sealed as required by the Act, and accordingly they convicted the appellant.

The question for the opinion of the Court was whether, upon the facts, the decision of the justices was erroneous in point of law.

Loehnis and *Geoffrey Ellis*, for the appellant. This bottle was sealed in accordance with the requirements of the Act. The object of the Act was to prevent children, sent to a public-house to fetch liquor, from abstracting the contents of the vessel containing it, and the test whether a bottle is properly sealed is, could a child withdraw the cork or stopper without destroying the substance securing it. Although the policeman succeeded in removing this label without tearing it, a child could not have done so. There was in fact a destruction of the label, because the gum on it was of necessity destroyed by the means employed to remove the label.

C. A. Russell, K.C. (*Compston* with him), for the respondent. The justices came to a right decision. It was proved that this so-called seal could be removed and afterwards replaced in an uninjured condition by a method in the possession of every child.

LORD ALVERSTONE C.J. The question in this case is whether the justices were right in law in deciding that this bottle was not so sealed as to comply with the requirements of the Intoxicating Liquors (Sale to Children) Act, 1901. By s. 5 the expression "sealed" means "secured with any substance without the destruction of which the cork, plug or stopper cannot be withdrawn." Having regard to the facts stated in the case it is, in my opinion, impossible to say that the justices were wrong in holding that the stopper could be withdrawn without the destruction of the substance, even if one treats the gum on the label as well as the label itself as constituting the "substance" by which the stopper was secured. The bottle was produced in Court before the justices, and after seeing the operation of the removal of the label they have stated their opinion to be that the stopper was not sealed in the manner required by the Act. Now the question is really one of fact, and, if there was any evidence to support the magistrates' finding, this Court cannot reverse it, and, in my opinion, it cannot be said that there was no evidence to support the finding. But I do not desire it to be thought that justices are bound to hold in every case that a label secured by gum is not a sufficient compliance with the requirements of the Act simply because by some means or other the label can be removed without being destroyed. I think that the true test is whether or not the stopper is so secured that the child cannot get at the liquor without the abstraction of the liquor being detected. The justices must determine in each case whether, having regard to the condition in which the bottle is at the time it is sold, the substance by which the stopper is secured would in the circumstances practically be destroyed by the act of the child abstracting the liquor. It is impossible to say that in the present case there was no evidence to support the finding of the magistrates, and the appeal must therefore be dismissed.

WILLS J. I agree. I think that the drafting of this Act is singularly unfortunate, because although a bottle might be so tightly corked that it would take a strong man to draw the cork, and also secured by strong wire, yet the requirements of this Act (which was supposed to be merely for the protection of children) would not be complied with unless the cork was further fastened with some substance which must be destroyed before the cork could be drawn. In the present case, however, it cannot be said that there was no evidence to support the finding of the justices.

CHANNELL J. I agree that this is a question of fact, and I agree with the test laid down by my Lord, namely, that the bottle must be so secured that the liquor cannot be got at without detection.

Appeal dismissed.

Solicitors for appellant: *Godden, Son & Holme, for Neill & Holland, Bradford.*

Solicitors for respondent: *Clements, Williams & Co., for Trevor Edwards & Co., Wakefield.*

F. O. R.

[IN THE COURT OF APPEAL.]

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1903
Feb. 27.

In re A DEBTOR.
Ex parte THE DEBTOR.

Bankruptcy—Receiving Order—Debt to Money-lender—"Harsh and Unconscionable Transaction"—"Excessive Interest"—Power of Court to reopen Transaction—Money-lenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1, *sub-ss.* 1, 3.

Under s. 1 of the Money-lenders Act, 1900, a transaction with a money-lender can be reopened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not "such that a Court of Equity would have given relief" before the Act.

Decision of Ridley J. in *Wilton & Co.* v. *Osborn*, [1901] 2 K. B. 110, disapproved.

This power to give relief can be exercised by the Court of Bankruptcy upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which the debtor did not apply for relief under s. 1.

Semble, that the interest charged upon a loan may be so excessive as of itself to render the transaction "harsh and unconscionable."

THIS was an appeal by a debtor from a receiving order made against him by one of the registrars in bankruptcy.

The order was made upon a bankruptcy petition presented by a money-lender from whom the debtor had borrowed various sums of money at rates of interest which he alleged to be excessive and exorbitant, amounting, it was said, in one case to 200 and in another case to 80 per cent. per annum. The debtor was employed as a clerk at a moderate salary, and being in pecuniary difficulties he applied to the money-lender, and was induced to do so by an advertisement which the lender had published in a newspaper. In an action in the King's Bench Division the lender had recovered final judgment under Order XIV. against the debtor for the amount due under the contract. The debtor did not in this action claim relief under s. 1 of the Money-lenders Act, 1900. (1) The creditor served

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(1) By s. 1, "(1.) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this

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the debtor with a bankruptcy notice in respect of the judgment debt, and the bankruptcy petition was founded upon that debt and the failure of the debtor to comply with the requirements of the notice. On the hearing of the petition the debtor claimed to be entitled to relief under s. 1, sub-s. 1, of the above Act, on the ground that the transaction was harsh and unconscionable by reason that the interest charged for the loans was excessive. The registrar considered that he was bound by the decision of Ridley J. in *Wilton & Co.* v. *Osborn* (1) (afterwards followed by Channell J. in *Barnett* v. *Coronna* (2)) to hold that relief could be given under s. 1, sub-s. 1, only in a case in which a Court of Equity would have given relief before the Act, and that a Court of Equity would not then have held that the mere fact that interest or other charges

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Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and, if the money-lender has parted with the security, may order him to indemnify the borrower or other person sued.

"(3.) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

"(6.) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court."

(1) [1901] 2 K. B. 110.

(2) Vide *The Times*, June 16, 1902.

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were excessive was a sufficient ground for setting aside the bargain between the parties.

The debtor appealed.

Germaine, K.C., and *F. Cooper Willis*, for the debtor. The registrar was no doubt bound by the decision in *Wilton & Co.* v. *Osborn* (1); but that decision does not bind this Court, and it is submitted that it was based upon an erroneous construction of s. 1. This construction would render the Act nugatory, whereas, as the title of the Act shews, it was intended to amend the law with respect to money-lenders. It is submitted that the words "or otherwise" mean "in other respects," and that the Court can give relief when a transaction is "harsh and unconscionable," even if it be one in which a Court of Equity would not have given relief before the Act. If the decision of Ridley J. is right, the word "otherwise" might as well have been omitted from the section.

[ROMER L.J. This point might have been taken in the action.]

No doubt it might; but the judgment is not conclusive in bankruptcy.

[ROMER L.J. Is this a proceeding "taken for the recovery of money lent"?]

It is a mode of execution. And sub-s. 3 of s. 1 expressly gives jurisdiction to the Court of Bankruptcy.

Moreover, the Court has a discretion as to making a receiving order: Bankruptcy Act, 1883, s. 7, sub-s. 3. The Court will not make a receiving order when the effect of it would be to deprive the debtor of his only asset: *In re Otway*. (2) The debtor would, no doubt, lose his appointment.

Scarlett, for the petitioning creditor. The rate of interest was no doubt high, but it does not follow that the transaction was harsh and unconscionable. If the Act does apply, this defence ought to have been raised in the action.

It is submitted that Ridley J. and Channell J. have rightly construed sub-s. 1. According to the grammatical construction, the words "such that a Court of Equity would give

(1) [1901] 2 K. B. 110.

(2) [1895] 1 Q. B. 812.

relief" govern the whole sentence. If the Legislature had intended to alter the law to the extent suggested, they would have said so in plain and unmistakable words.

In such a case as the present a Court of Equity would not have given relief: *Webster* v. *Cook.* (1) There was no pressure by the money-lender, and the parties stood on equal terms. The Court will not give a new meaning to the word "unconscionable." No advantage was taken of the debtor by the money-lender. The debtor went to him of his own accord: *Nevill* v. *Snelling.* (2) If the words "harsh and unconscionable" do not refer to bargains of the kind which the Courts have always held to be such, the meaning is left in great uncertainty; and that was the view taken by Ridley J.

COLLINS M.R., after stating the facts, continued:—The only question which we have to decide is whether the decision of Ridley J. in *Wilton & Co.* v. *Osborn* (3) was correct. There it was held that the only standard to be applied under s. 1 of the Money-lenders Act, 1900, was that which was adopted by the Courts of Equity before the Act. But it is important to observe that the Act is intituled "An Act to amend the law with respect to persons carrying on business as money-lenders." It seems to me very unlikely that the Legislature should have gone through all these formalities for the mere purpose of leaving the law exactly as it stood before. Some change beneficial to borrowers must have been intended. Now the words of s. 1 are these: "there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses . . . . or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction . . . . and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable"; and the latter words afford some indication of what the Legislature regarded as "excessive interest." Ridley J. held on the construction of these words that the Legislature must be taken to have limited the relief to be given to a borrower to that relief which a Court of Equity would have given before the Act. I cannot agree with that construction. In my opinion the relief which may be given under the Act cannot be thus limited. Upon the natural grammatical construction of the words, I think the words "harsh and unconscionable" are distinct from and independent of the words which follow. Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges. Before the Act the Courts of Equity used to give relief in special cases when the parties stood in a particular relation to each other, or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir. I will not say that under this section the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable, even as against a borrower who was of full age and who stood in no special relation to the lender. The enactment is not that the Court is to apply only that standard which a Court of Equity would have applied apart from the statute. The construction which Ridley J. put upon the section in effect omits from it the words "or otherwise." That is not the right way to construe an Act of Parliament. Two classes of cases are mentioned in the section —transactions which the Court is satisfied are "harsh and unconscionable," and transactions which are "otherwise such that a Court of Equity would give relief." Without giving an exact definition of the meaning of the words, it is sufficient to say that the standard is not only that which a Court of Equity would have adopted before the Act. The other construction would render the Act nugatory. The registrar was right in holding that he was debarred by the decision of Ridley J. from considering whether the present transaction was "harsh and unconscionable." That bar will be now removed, and the case must go back to the registrar that he may consider whether relief ought to be given to the debtor under the Act.

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(1) (1867) L. R. 2 Ch. 542.

(2) (1880) 15 Ch. D. 679.

(3) [1901] 2 K. B. 110.

ROMER L.J. I am of the same opinion. This section is certainly not free from difficulty. But in my opinion it was intended to extend the right of a borrower to relief as against a money-lender beyond that which existed in a Court of Equity before the Act. In my judgment the phrase "harsh and unconscionable" stands by itself as an isolated phrase, and is not bound up with the words which follow it, so as to limit "harsh and unconscionable" to those cases in which before the Act a Court of Equity would have given relief to a borrower. I think the words "or otherwise" must be read as equivalent to "or in other respects," or some such words. The words "harsh and unconscionable" ought not to receive a limited or artificial meaning by reference to the rules of equity before the Act. In my opinion a transaction may be "harsh and unconscionable," and relief may be given under the Act, even if the transaction is not one in respect of which a Court of Equity would have given relief before the Act. I cannot therefore agree with the decision of Ridley J. in *Wilton & Co.* v. *Osborn* (1) so far as it limited the operation of the section. The appeal must be allowed, and the case must go back to the registrar, who has not yet had an opportunity of considering whether relief ought to be given under the Act.

COZENS-HARDY L.J. I am of the same opinion and for the same reasons. As a matter of common sense, I ask, was the section intended to alter the law, or to leave it exactly as it stood before? The only answer must be that it was intended to alter the law. It is, I think, a very strong argument against the decision of Ridley J. that, if that decision is right, no transaction would be touched by the section unless it could have been touched before under the general jurisdiction of the Courts of Equity. But, even upon the grammatical construction of the words, it seems to me that the view taken by Ridley J.

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(1) [1901] 2 K. B. 110.

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Cozens-Hardy L.J.

cannot be justified. It in effect either strikes out the words "harsh and unconscionable," thus doing great violence to the section, or else inserts the word "so" before "harsh and unconscionable." I do not think either of those alternatives ought to be adopted. I should be sorry to lay down any rule which would fetter the discretion of the Court by the old rules of the Courts of Equity. The Court must, in my opinion, be satisfied that the rate of interest charged is excessive, or that the other charges for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable. I should be sorry to say that the rate of interest charged and the other charges might not be so excessive as for that reason alone to render the transaction "harsh and unconscionable." But in considering whether the interest is excessive the Court must have regard, not only to the rate of interest, but also to the risk incurred by the lender and to all the other circumstances of the case.

Appeal allowed.

Solicitors: *H. W. Chatterton; Alfred Slater.*

W. L. C.

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March 18.

[IN THE COURT OF APPEAL.]

MILLER *v.* THE LAW ACCIDENT INSURANCE COMPANY.

Insurance, Marine—Policy—"Restraint of Princes and People"—Prohibition against Entry into Country of Diseased Cattle—Warranty against "Capture, Seizure, and Detention"—Operation on Clause as to Restraint.

The operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is a "restraint of princes or people" within the meaning of a Lloyd's policy of marine insurance.

A warranty in a policy of marine insurance against "capture, seizure, and detention" operates to release the insurers from liability under the words "arrests, restraints, and detainments of kings, princes, and people" in the body of the policy.

Appeal from the judgment of Bigham J., [1902] 2 K. B. 694, dismissed.

Appeal from the judgment of Bigham J., reported [1902] 2 K. B. 694.

The following statement of facts is taken in substance from the written judgment of the learned judge in the Court below.

The action was brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance; the voyage was from Liverpool to Monte Video $\frac{\text{and}}{\text{or}}$ Buenos Ayres. The risks insured against were described in the usual way, and included "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever . . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises or any part thereof." It was under these words that the claim was made, and the question for determination was whether the facts of the case brought it within the meaning of the words. At the foot of the policy was the clause, "Warranted free of capture, seizure, or detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war." And the further question arose whether this warranty operated to release the insurers from liability under the clause as to the risks insured against.

The plaintiff shipped a number of bulls by the steamer *Bellevue*, to be carried from Liverpool to Buenos Ayres, and, having made the shipment, effected the policy sued upon. Many months before the shipment was made the Argentine Government had passed a decree forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. Art. 5 of the decree provided that animals suspected of being affected with certain diseases should be slaughtered. The *Bellevue* arrived at Buenos Ayres on September 10, 1900, and the cattle were duly inspected on board the vessel by Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and they ordered the vessel to leave the port; their order provided that the captain, if he so wished, might tranship the cattle to another vessel outside the limits of the port for carriage to some other destination. On the next day, September 11, the Ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom until further notice. As to this, the learned judge at the trial found as a fact that the animals were suffering from disease within the meaning of the decree, and that the order forbidding their landing was lawfully made by the Argentine authorities. In obedience to this order, the *Bellevue* left the dock at Buenos Ayres, and on September 14 the cattle were transhipped into lighters at Santiago, a place outside the limits of the port. On the same day notice of abandonment was given. The cattle remained in the lighters for some days, when a ship called the *Sallust* was found to take them on to Monte Video, at which place, after being forty days in quarantine, they were landed and sold at a considerable loss.

The learned judge decided that there had been no restraint of princes or people within the meaning of the policy, and gave judgment for the defendants. (1)

The plaintiff appealed.

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(1) [1902] 2 K. B. 694.

March 17. *J. A. Hamilton, K.C.*, and *Maurice Hill*, for the plaintiff. There was in the present case a constructive total loss of the subject-matter of the insurance by a restraint of people within the meaning of the policy. The learned judge in the Court below was wrong in holding that the action of the Argentine executive in this case was not a restraint of people, because it was in accordance with the ordinary municipal law of the country. There are many cases which have been held to come within the words "arrests, restraints, and detainments, &c.," although what was there done was in accordance with the ordinary law of the country; and it is not necessary, as suggested by the learned judge, that there should be anything in the nature of actual violence or force about the restraint or taking. In such a case the whole power of the State is behind the action of the executive, and there is potential, if not actual, force involved. In *Cory* v. *Burr* (1) there was no actual violence, and what was done was in the ordinary course of the Spanish revenue law, but it was held to be a case of "seizure" within the meaning of the words of the policy. The application of civil process, as in *Finlay* v. *Liverpool and Great Western Steamship Co.* (2), is not a restraint of princes or people, not because it is in the ordinary course of law, but because, though issued by authority of the State, it is not an act of State. It is not an act of the executive government done by it as such, but something primarily done for the purposes and in the interests of the individual litigant. Any action of the executive government of a country or of its officers on its behalf, whereby the goods insured are prevented from arriving at their destination, may be a restraint of princes or people within the meaning of the policy, whether it be action in the ordinary course of the law of the country, or extraordinary action dictated by the emergencies of war or political commotion. It is clear that, if the voyage be thereby lost and the mercantile adventure with regard to the goods frustrated, there is a constructive total loss, although the goods insured exist in specie and are restored to the owner: *Barker* v. *Blakes* (1); *Rotch* v. *Edie.* (2) This case is really concluded by the decision in *Rodocanachi* v. *Elliott.* (3) There the goods insured continued to exist in specie, but, by reason of their being within the lines of the German army besieging Paris, the owner was deprived of the control of them for an indefinite period, and they could not be forwarded to their destination. It was held that under those circumstances there was a constructive total loss by restraint of princes. In the United States quarantine regulations have been held to come within the words "restraints of people": *The Progreso.* (4) In *Brunner* v. *Webster* (5) it seems to have been assumed that this would be so; but in that case there had been no prohibition in fact of the importation of the goods.

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(1) (1883) 8 App. Cas. 393.

(2) (1870) 23 L. T. 251.

This case does not come within the class of cases of which *Hadkinson* v. *Robinson* (6) is an example. This is not like a case in which the voyage is not completed by the master for fear of an embargo, or of a blockade, at the port of destination. Here the ship had arrived at the port of destination, and the cargo was on the point of being discharged, but, through the interference of the Argentine executive, the discharge was prevented, and the ship obliged to leave the port. The proximate cause of the loss was not the election of the captain to abandon the voyage for fear of possible risk, but the immediate action of the Argentine officials.

[They also cited on this point 2 Phillips, s. 1485; Arnould, s. 1142.]

The case does not come within the warranty against capture, seizure, and detention. That warranty cannot be construed as striking out of the policy altogether the words "arrests, restraints, and detainments of kings, princes, and people." It is a general rule of construction that all parts of a contract must, if possible, have effect. There was nothing in the

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(1) (1808) 9 East, 283; 9 R. R. 558.

(2) (1795) 6 T. R. 413; 3 R. R. 222.

(3) (1873) L. R. 8 C. P. 649; (1874) L. R. 9 C. P. 518.

(4) (1892) 50 Fed. Rep. 835.

(5) (1900) 5 C. C. 167.

(6) (1803) 3 B. & P. 388; 7 R. R. 786.

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present case that can possibly be said to amount to a capture, seizure, or detention of the goods.

[They cited on this point *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (1)]

Scrutton, K.C., and *Loehnis*, for the defendants. There was no loss of the subject-matter of insurance in this case by a restraint or detainment of princes or people. By the ordinary law of the Argentine Republic, existing at the time when the voyage commenced, the landing of infected cattle was prohibited, and therefore unlawful. On the arrival of the ship no actual force was used to prevent the landing of the cattle, but notice of the illegality of landing them was given to the master, and thereupon he proceeded with the cattle to Monte Video, a port which was also named in the policy, and there landed the cattle, which had always been in the custody of the assured. "Restraint or detainment of princes or people" occurs when the strong hand of the State is put upon the goods in a forcible manner in the case of some extraordinary exigency such as war, or anticipated war, or civil commotion: see per Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (2); it does not refer to the mere operation of the ordinary municipal law of the place, when submitted to without resistance by those concerned, or even when enforced with actual force by the legal authorities. Doubtless, if the master had insisted on landing the cattle, force would have been used by the Argentine executive to prevent him from doing so; but that does not constitute what took place a restraint of princes or people. The policy cannot have been intended to insure that it should be lawful to land the cattle at Buenos Ayres. The case is in substance within the principle of *Hadkinson* v. *Robinson* (3), *Lubbock* v. *Rowcroft* (4), and *Forster* v. *Christie*. (5) Those cases shew that, if, in view of peril ahead of capture, restraint, or detention, the master, in order to avoid it, abandons the attempt to take the goods to the port of destination, and goes with them to another

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(1) [1901] 2 K. B. 919; [1902] 2 K. B. 489.

(2) 23 L. T. 251.

(3) 3 B. & P. 388; 7 R. R. 786.

(4) (1803) 5 Esp. 50; 8 R. R. 830.

(5) (1809) 11 East, 205; 10 R. R. 470.

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port, where they are sold at a loss, that is not a loss within the policy, the loss that occurred not being proximately caused by any peril insured against. Decisions as to what constitutes "restraint of people" within the meaning of charterparties and bills of lading are not necessarily in point in the present case, for in cases of insurance the proximate cause of loss is to be regarded: *Hamilton* v. *Pandorf* (1); *The Xantho.* (2) In this case the cattle were never lost in any sense. The owners never lost the control of them, and they were taken to a port named in the policy. All that happened to them was that by reason of the law of the Argentine Republic they could not be landed at Buenos Ayres. All that was really lost was the profit on sale at that place. The underwriters were not insurers of profit or that the condition of the cattle should continue to be such that they could be landed at the port of destination without contravention of the law of that country. In *Rodocanachi* v. *Elliott* (3) the goods were taken out of the control of the owner for an indefinite period, and could not be removed in any direction. There is no English case as to the effect of quarantine in relation to this subject. The cases as to embargo do not help the plaintiff, for an embargo is an act of the State, which is outside the ordinary law, and may be treated as an act of war.

Assuming that the plaintiff is right in saying that there was a restraint or detainment of people, the case falls within the warranty against capture, seizure, and detention. If the prevention of the landing of the cattle at Buenos Ayres can be called a restraint or detainment within the meaning of that word in the body of the policy, it is submitted that it must be a detention within the meaning of the warranty.

J. A. Hamilton, K.C., in reply.

March 18. Vaughan Williams L.J. This is an appeal from a judgment of Bigham J. I agree with the conclusion at which my brethren have arrived, and I only propose to add a few words to the judgments that are about to be delivered.

(1) (1887) 12 App. Cas. 518.
(2) (1887) 12 App. Cas. 503.
(3) L. R. 8 C. P. 649; L. R. 9 C. P. 518.

In my opinion, so far as the words in the body of the policy are concerned, I have no doubt that the events that occurred in the present case would bring it within the words "restraints of people," and therefore, but for the warranty with which I will deal presently, the underwriters would be insurers of this risk. The insurance was of cattle shipped to Buenos Ayres, a port of destination which happened to be the only place to which it was commercially worth while to send them for sale. What happened was that in consequence of the impossibility of landing the cattle at Buenos Ayres the adventure was defeated, and the underwriters, if liable at all, are liable for the value of the cattle.

In my judgment the issue of the decree by the Argentine Government, under which the landing of the cattle was forbidden, was an act of State, and comes within the words of the policy, "restraints of people." There seems to be no analogy between this case and that of the arrest or detention of a ship to enforce the rights of a private individual.

When I come to the question of warranty, I should be inclined to say, were I dealing with a document other than a policy of marine insurance, that a restraint of this sort, which is only in the nature of an injunction forbidding the landing of the cattle, but allowing the rest of the cargo to be landed under certain conditions if the master thought fit to comply with them, would not, within the ordinary meaning of the English language, come within the words "capture, seizure, or detention" in the warranty. It is manifest that it is not a capture, and I should have thought that it was not seizure or detention. But I accept the suggestion that one must not construe a policy of insurance in the way in which one would have to construe other documents. The learned judge in his judgment said (1): "It was said that this exception ought not to be interpreted to include 'restraint.' I think, however, that the very object of this exception is to free the underwriters from liability under the words "arrests, restraints, and detainments" in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before—and to what, if not to the words I have mentioned?" I see that Parsons, in his treatise on Marine Insurance, vol. i. p. 584, does not speak with any great certainty on the matter, but suggests that "detention" is "a taking with intent to return the thing taken; as where a ship is arrested by an embargo, or stopped for search, or detained in port by an actual blockade thereof, or, perhaps, by being lawfully restrained from entering her port of destination by a blockading force." I do not see much difference between a restraint by a blockading force and a restraint arising under the operation of a sanitary law. In these circumstances, in view of the meaning placed by the authorities on the words of such a warranty, I do not feel sufficient confidence in a conclusion founded on the natural meaning of the words to justify me in saying that the meaning put upon them by the learned judge was incorrect.

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(1) [1902] 2 K. B. 694, at p. 700.

The result is that the judgment of Bigham J. will be affirmed, though not for the reasons given in the first part of that judgment, for with them I cannot agree, but for the reasons given in the later part, namely, those based on the warranty clause.

STIRLING L.J. I am of the same opinion. In the first place, I think that the proceedings at Buenos Ayres in September, 1900, amounted to the exercise of force by the Argentine Government so as to bring the case within the perils insured against in the policy. What took place was that the ship arrived at Buenos Ayres and was inspected by a veterinary surgeon, who discovered that the cattle were or might be suffering from an infectious disease. The Ministry of Agriculture thereupon intervened, and served a notice upon the captain by which the consignees were informed of a resolution under art. 5 of the existing regulations that the steamship was to go out immediately from the port, but that the captain was to be at liberty, if it suited him, to effect the transhipment of the animals to another vessel outside the port. On the following day there was a decree of the President which stated the arrival of cattle by the steamer *Bellevue*, and decreed that the discharge of all cattle from the United Kingdom was stopped until further notice. The captain accordingly took the ship outside the port, and, with the view to minimize the loss, transhipped the cattle into another vessel, and they were carried to Monte Video and there sold at a great loss.

It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened. The natural inference to be arrived at upon these facts is that, if the captain had not acted as he did, possession would have been taken of the ship by persons acting directly under the authority of the Government, and the cattle would have been slaughtered under art. 5 of the regulations to which I have referred. The captain, therefore, was justified in taking the ship outside the port and transferring the cattle to another ship in order to minimize the loss, and in so doing he acted under compulsion of superior force. It was not the less the act of the Argentine Government because it was done under the laws in force in that country. An intervention to enforce laws relating to revenue has been decided to be a peril within the terms of a policy of insurance similar to those of the policy before us, and I can see no distinction in principle between enforcing laws relating to revenue and enforcing sanitary laws. The principle, so far as it relates to enforcing revenue laws, is recognised in *Cory* v. *Burr* (1), where the vessel implicated was engaged in smuggling, and in *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (2) On behalf of the defendants it was urged that a long line of authorities, of which *Hadkinson* v. *Robinson* (3) is a leading example, applied to this case. The effect of those cases was summed up by Brett J. in *Rodocanachi* v. *Elliott* (4): "If the master of the ship, of his own accord, or in obedience to the orders of the officers of the Queen, abstains from entering a blockaded port, the causa proxima is not the blockade, but the voluntary act of the master. But no English case has yet decided that, where the ship or goods are detained within a blockaded port, that would not be a case falling within the

(1) 8 App. Cas. 393.
(2) [1902] 2 K. B. 489.
(3) 3 B. & P. 388; 7 R. R. 786.
(4) L. R. 8 C. P. 649, at p. 670.

words 'restraint of princes.'" It seems to me that this case goes far beyond what is there laid down. In the view I take, the master did not act voluntarily in this case. If, when about to enter the port, the master had been informed of the existence of a law restricting the right to land cattle, and that the Government were likely to put that law into force, and he had then gone on his voyage and not entered the port, the case would have been like that in *Hadkinson* v. *Robinson* (1) and similar authorities. Here the master went as far as he could towards the completion of the venture, and only desisted when the Government intervened.

Upon the second point decided in the Court below I do not differ from the judgment of the learned judge. The words of the warranty are, no doubt, difficult to construe; but I do not feel at liberty to differ from the conclusion arrived at by the other members of the Court.

MATHEW L.J. read the following judgment:—The material facts may be stated in a few words. By the order of the administration—the executive authority at Buenos Ayres—the vessel, the *Bellevue*, was stopped before she reached her berth. The discharge of the cattle was prohibited, and the animals were detained on board the vessel. The master was directed to leave Buenos Ayres and land the cattle at some other port. He obeyed. The animals were transhipped outside the port and sent to Monte Video. It was not disputed that the object of the assured in shipping the cattle to Buenos Ayres was in consequence altogether defeated. It was argued for the defendants that the loss thus occasioned was not due to "arrest, restraint, or detainment" within the meaning of the policy. The words, it was contended, implied the use of direct force, and none had in fact been employed. The case of *Finlay* v. *Liverpool and Great Western Steamship Co.* (2), upon which reliance was placed by the defendants' counsel, affords no grounds for this position, and no other satisfactory authority was referred to. If actual force was not used it was because there was no opposition. The master submitted to the orders

(1) 3 B. & P. 388; 7 R. R. 786.

(2) 23 L. T. 251.

Mathew L.J.

of the administration. The result to the assured was the same as if force had been used, and, even if the defendants were right in their interpretation of the words in question, the loss was ejusdem generis with the peril described in the policy, and was covered by the general words "other losses and misfortunes," which end the enumeration of the perils insured against. It was further argued for the defendants that the loss was not within the policy because the acts of the administration were illegal—that is to say, were out of the ordinary course of the law. There was no reason for saying that what was done by the administration was out of the ordinary course of the law of the port of destination. Even if it were, I do not see how it would help the underwriters. I am of opinion that, but for the warranty, the underwriters would be responsible for the loss in question. This conclusion is in accordance with the decisions referred to in the argument with respect to the meaning of similar words in charterparties where shipowners and charterers have been exonerated from the performance of their obligations by a blockade which rendered access to a port commercially impracticable. No reason was given with respect to this insurance why the words "arrest of princes" in this policy and in an ordinary charterparty should have different meanings. But the policy contains the warranty against "capture, seizure, or detention," commonly called at Lloyd's the f.c.s. clause; and it was argued for the defendants that their liability under the earlier part of the policy was cancelled. The warranty goes beyond the words "arrest" and "restraint." "Capture" and "seizure" are stronger expressions. It was suggested that what was meant were acts of warfare; but it is clearly settled that the words have no such restricted meaning: *Cory* v. *Burr*. (1) It is not, in my opinion, intended by the alteration of terms to describe a different class of perils from those previously mentioned. Counsel for the plaintiff failed to suggest any practical difference for the present purpose between the two sets of phrases. It seems to me sufficient to point out that the word "detention" in the warranty cannot be distinguished from the word "detainment" in the earlier part of the policy. The loss, in my judgment, is within the warranty, and the underwriters are not liable in this action. For these reasons I agree that the appeal must be dismissed.

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(1) 8 App. Cas. 393.

Appeal dismissed.

Solicitors for plaintiff: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Walton, Johnson, Bubb & Whatton.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1903
Feb. 20.

BROWNE, APPELLANT *v.* FURTADO (SURVEYOR OF TAXES), RESPONDENT.

Revenue—House Duty—School Buildings—"Other Offices"—48 *Geo.* 3, *c.* 55, *Sched. B—House Tax Act*, 1851 (14 & 15 *Vict. c.* 36).

The appellant was the occupier of a dwelling-house and premises, which he used for the purposes of a boarding-school. He also occupied adjacent buildings, which were separated from the first-mentioned premises by a wall. There was a door in the wall through which, by means of a covered-in passage, there was communication between the premises on each side of the wall. The adjacent buildings were respectively used as a chapel, a gymnasium, class-rooms, fives courts, and for such like school purposes in connection with the boarding-school, other than the ordinary purposes of a dwelling-house:—

Held (reversing the judgment of Phillimore J.), that the adjacent buildings must be included in the valuation of the premises for the purposes of inhabited house duty, as being offices belonging to and occupied with the dwelling-house within the meaning of rule 2 of Sched. B. of 48 Geo. 3, c. 55.

APPEAL from the judgment of Phillimore J. upon a special case stated by Commissioners for income tax and inhabited house duties on an appeal against an assessment to inhabited house duty.

The appellant was by profession a schoolmaster. He was the owner and occupier of a house, school buildings, and grounds, at Eastbourne, known as St. Andrew's School, which formed the subject-matter of the assessment, and there carried on a school at which boys were boarded, educated, and prepared for the public schools. All the boys in the school were boarders. Part of the property, which was admitted to have been correctly included in the assessment, consisted of the residence of the appellant, the residence of the assistant masters, and the dormitories and living-rooms used by the boys. This part of the buildings contained full residential accommodation for the persons residing there, but as a matter of practice the boys were required to use, in the daytime, the closets, &c., in the other part of the property.

The portion of the property which the appellant contended was wrongly included in the assessment consisted of the following rooms and buildings, which were delineated on a plan annexed to the case and indicated thereon by letters (*a*) to (*m*) inclusive: (*a*), (*b*), and (*c*) fives courts; (*d*) closets and urinals; (*e*) passage; (*f*) and (*g*) rooms in which the boys changed their clothes before and after physical exercise; (*h*) play-room with gymnasium over: (*i*) class-room with class-room over; (*j*) closets; (*k*) class-room; (*l*) carpenter's shop used for teaching the boys, with store in connection with over; (*m*) chapel.

No persons slept in or over any of the rooms and buildings lastly before mentioned, which were called in the case the "buildings in dispute." The buildings in dispute were separated from the rest of the school buildings by a wall marked A B on the plan. The only means of internal communication between the buildings in dispute and the rest of the school buildings was through a doorway in that wall on the ground-floor, in which there were doors and the passage (*e*), which was a roofed-in passage. The whole of the buildings included in the assessment were contained in the same inclosed grounds owned and occupied by the appellant.

The chapel and one of the changing-rooms were erected before 1893, and before the rest of the buildings in dispute. The rest of those buildings were erected at various times from 1893 to 1897. The Commissioners decided that the buildings in dispute were rightly included in the assessment.

Phillimore J. held that, with the exception of the passage, the closets, and the changing-rooms, the buildings in dispute ought not to have been included in the assessment.

Sir E. Carson, S.-G., and *Rowlatt*, for the Crown. The cases appear to shew that the question whether there is internal communication is for the present purpose the main test whether structures are to be considered as one building or not. It is submitted that upon the facts the additional buildings in the present case constituted one building with the school premises. There was internal communication between those premises and the additional buildings, which were so constructed as to be fit for use together with the main building for the same purposes, namely, those of a boarding-school. The fact that structures stand side by side does not tend to shew that they are necessarily separate buildings, any more than the fact that structures stand one on the top of the other necessarily shews that they are one building. The question whether structures constitute one building is one of fact which must be determined according to the circumstances in each case. There was evidence in this case for the Commissioners that these school premises were all one building.

[They cited on this point *Grant* v. *Langston* (1); *London and Westminster Bank* v. *Smith*. (2)]

Secondly, the 2nd rule of Sched. B of 48 Geo. 3, c. 55, provides that, in assessing the duty, coach-houses, stables, brewhouses, &c., and "all other offices" occupied with the dwelling-house, are to be included in the valuation; and by the schedule to the House Tax Act, 1851, the duty is described as being "for every inhabited dwelling-house, which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of 20*l.* or upwards by the year." It is therefore clear that offices, though other than household offices, are to be included in the valuation, if occupied with the dwelling-house. It is submitted that the buildings in dispute come within the term "offices" as used in the House Tax Acts.

(1) [1900] A. C. 383.

(2) (1901) 85 L. T. 747.

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[They also cited *Young* v. *Douglas* (1); *Banks* v. *Glasgow and South Western Ry. Co.* (2); *In re Campbell* (3); *Russell* v. *Coutts* (4); *Cheape* v. *Kinmont.* (5)]

Carver, K.C., and *Llewelyn Davies*, for the appellant. (6) The buildings in dispute cannot be considered as forming one building with the dwelling-house. The fact of there being an internal communication, such as the passage in the present case, cannot necessarily and in all cases constitute the structures between which there is such a communication one building. In such cases as *London and Westminster Bank* v. *Smith* (7), where the building is primâ facie as seen from without one house, and an effort is being made to shew that, nevertheless, there are really two buildings structurally, the existence or non-existence of an internal communication may be the crucial test. But here the effort on the part of the Crown really is to make out that what are primâ facie separate buildings really constitute one building. It is submitted that these are really separate educational buildings used by the appellant for the purposes of his business, and not for residential purposes. It is an accident that his pupils are boarders. Suppose he occupied the dwelling-house merely for the purposes of the residence of himself and family, and used the buildings in dispute for the education of day scholars: or suppose that, instead of the additional buildings being contiguous, they were some distance off, and were used merely for educational purposes in the daytime, it could hardly in those cases be contended that the buildings could be included in the valuation with the dwelling-house. The expression "other offices" as used in the schedule to the House Tax Act, 1851, must be construed by the light of the provisions of rule 2 of Sched. B of 48 Geo. 3, c. 55. The buildings specifically enumerated in that rule are all in the nature of household or residential offices. It is contended that the words "all other offices" in the rule must be construed as confined to buildings of the same character, and ought not be held to include buildings used merely for business purposes, such as those in the present case. These buildings could not, it is submitted, have been considered as household or other offices, if the pupils had been day scholars only; and the fact that in this case the pupils resided in the adjoining house cannot make any difference.

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(1) (1879) 1 Tax Cases, 227.

(2) (1880) 1 Tax Cases, 325.

(3) (1880) 1 Tax Cases, 255.

(4) (1881) 1 Tax Cases, 469.

(5) (1888) 2 Tax Cases, 418.

(6) The term "appellant" is used in reference to the position occupied by the parties in the Court below.

(7) 85 L. T. 747.

[They cited *Clifton College* v. *Tompson* (1); *Charter House School* v. *Gayler* (2); *Maple & Co.* v. *Wilson*. (3)]

Sir E. Carson, S.-G., for the Crown, in reply. Where buildings are occupied and used as offices in conjunction with a dwelling-house, as these were, it would be practically impossible to analyze and split up the purposes for which they are used, and distinguish between residential and non-residential purposes, in the manner suggested by the appellant's contention. If parts of a dwelling-house are used for educational as distinguished from ordinary residential purposes, it could not be suggested that they are not assessable. That being so, there is no ground for suggesting that adjacent premises similarly used in conjunction with the dwelling-house are not assessable.

VAUGHAN WILLIAMS L.J. The question in this case is whether certain buildings have been rightly included in the assessment of a dwelling-house to inhabited house duty. The facts of the case, as I understand them, are as follows. There is a house occupied and used by the appellant, who is a schoolmaster, as a boarding-school, in which he himself and assistant masters and the boys reside, and there is a certain amount of ground around the school, which is inclosed by a wall. That wall has a door in it; and on the other side of the wall are a covered passage and various buildings, which are used for different purposes, such as those of a chapel, fives courts, changing-rooms, and sanitary offices; but, for whatever purposes they are used, there can be no doubt that all these

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(1) [1896] 1 Q. B. 432.

(2) [1896] 1 Q. B. 437.

(3) (1901) 4 Tax Cases, 390.

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rooms and buildings on the far side of the wall, with which there is this communication by means of the door and passage, are used for the accommodation of the pupils in the school, and for the purpose of making their residence there more wholesome and convenient, or of promoting their instruction by the provision of more roomy and commodious class-rooms. There are class-rooms also apparently in the old part of the school; and the whole of the premises, whether on one side or the other of the wall, are in the occupation of the appellant as a schoolmaster, and used by him for the purposes of his school. The question is whether, in the valuation of the school as an inhabited house, the buildings and rooms on the far side of the wall ought to be included.

The first question which arises is whether it is true to say that the whole of the premises, both the old and the additional buildings, constitute structurally one building. Speaking for myself, I feel a difficulty in arriving at the conclusion that they do. I am not prepared to assent to the proposition that the mere fact of the existence of an internal communication necessarily and in all cases makes what would otherwise be two buildings or houses adjacent to one another structurally one building or house, even when the whole is in the same occupation; and I think that the view I am expressing in this respect is strongly fortified by the rules, and particularly rule 3 of Sched. B of 48 Geo. 3, c. 55. Taking that rule into consideration, I should hesitate to say that the whole of the buildings in this case constitute structurally one house. But I do not think that it is necessary in this case to decide that question. We have to see what by the legislation is made the subject of the duty in respect of inhabited houses, and what is to be included in the valuation for the purposes of that duty.

The House Tax Act, 1851, s. 1, provides that there shall be assessed on inhabited dwelling-houses the several duties set forth in the schedule, payable according to the annual value of such dwelling-houses; and s. 2 incorporates the rules with reference to the duties on inhabited dwelling-houses according to the value thereof, as set forth in the schedule marked B of the old Act, 48 Geo. 3, c. 55. The schedule of the House Tax

Act, 1851, speaks of the "duties by this Act made payable upon inhabited dwelling-houses in and throughout Great Britain according to the annual value thereof; that is to say, for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of 20*l*. or upwards by the year." Therefore one sees at the outset that the subject-matter of the valuation is to be, not only that which is structurally one building with the house, but also the household and other offices, yards, and gardens therewith occupied. That being so, what we have to consider is whether in this case the buildings on the far side of the wall are within the words "household and other offices, yards, and gardens therewith occupied." In my judgment they are. I quite agree with the appellant's counsel that, in dealing with this case, the rules contained in Sched. B of 48 Geo. 3, c. 55, must be taken into consideration. Reliance was placed for the appellant on the 2nd of those rules, which provides that "every coach-house, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure-grounds belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house: provided no more than one acre of such gardens and pleasure-grounds shall in any case be so valued." Taking that rule into consideration, it appears to me that the buildings on the far side of the wall ought to be included in the valuation for the purposes of inhabited house duty. Those buildings are undoubtedly occupied and used for purposes identical with those for which the dwelling-house proper is occupied, namely, for the purposes of a boarding-school. That being so, I think we should be taking a very narrow view of what is included in the catalogue of matters given in rule 2 if we were to hold that the words "all other offices . . . . belonging to and occupied with any dwelling-house" did not include the buildings in dispute. I think, therefore, that these buildings ought to be valued together with the dwelling-house, as being occupied therewith for the same purposes for which it is occupied. I do not know that it is necessary that I should add anything further to the reasons which I have already given for the conclusion at which I have arrived; but I think, perhaps, I ought to say, with regard to the judgment of Phillimore J., that he appears to me to have been of opinion that, for the purposes of the tax, buildings on both sides of the wall must be treated as one subject-matter, but he set himself to ascertain whether, with regard to the buildings on the far side of the wall, there was anything in the character of the occupation which would exempt what would otherwise be subject to the tax. I could understand a conclusion that the whole of the buildings on the far side of the wall were exempt, but I confess that I cannot see my way to drawing a distinction between some of those buildings and others as the learned judge has done. It appears to me that, having regard to the statutory definition of the subject-matter of taxation under the House Tax Act, 1851, and the provisions of rule 2 of Sched. B of 48 Geo. 3, c. 55, the whole of the buildings in dispute must be included in the valuation for the purpose of inhabited house duty. For these reasons I think the appeal must be allowed.

STIRLING L.J. I am of the same opinion. The question in this case arises upon the terms of the House Tax Act, 1851, which imposes a duty on inhabited dwelling-houses, and by the schedule directs that, in ascertaining their value for the purposes of the tax, there shall be taken into consideration, not merely the house itself, but also "household and other offices, yards, and gardens therewith occupied." The schedule shews plainly that buildings were in the eyes of the Legislature not the less the subject of taxation as inhabited dwelling-houses, because a portion of them might be used for business purposes. The schedule expressly refers to the case of a dwelling-house occupied by a person engaged in trade, who exposes for sale goods, wares, or merchandise in any shop or warehouse, being part of the same dwelling-house; to the case of a dwelling-house being occupied by any person licensed to sell therein by retail beer, ale, wine, or other liquors; and to the case of a dwelling-house, which is a farmhouse occupied by a tenant or farm servant, and bonâ fide used for the purposes of husbandry only; and in those cases provides that the duty shall be imposed at a lower rate. By the 2nd section of the Act it is provided that certain rules set out in Sched. B of 48 Geo. 3, c. 55, shall remain and be in full force with respect to the duties thereby granted. The 2nd of these rules provides that "every coach-house, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure-grounds belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house." In the present case we have to deal with a group of buildings, of which part undoubtedly is an inhabited dwelling-house within the Act. That part is occupied by the master of a school with his family and a number of boarders whom he instructs. For the purposes of his business as a schoolmaster, he has built adjacent buildings, that are used for the purposes of the scholars who reside in the house, which admittedly is the subject of taxation as an inhabited house. The question arises with regard to these adjacent buildings. They include, amongst others, class-rooms, a carpenter's shop, a chapel which is not consecrated, but in which religious services are performed, and also fives courts for the recreation of the boys. There is a communication between these buildings and the house by means of a covered passage. Structurally these buildings do not appear to form one building with the dwelling-house; at least I am not satisfied that they do so. But they are all in the occupation of the schoolmaster, and are occupied for the purposes of the boarding-school, which is carried on in the main building. The question is whether they are to be taken into consideration in the assessment of the inhabited house duty. If, as I am rather inclined to think, they cannot for this purpose be treated as one building with the school-house, nevertheless they appear to me to be such buildings as are referred to by rule 2 of Sched. B of 48 Geo. 3, c. 55. It is not disputed that such buildings may be entirely separate from the main building. The argument for the schoolmaster was that, regard being had to the nature of the buildings specifically enumerated

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in the rule, which are all of a household or domestic character, the "other offices" thereby contemplated must be offices used for the purposes of the house considered as a dwelling-house, whereas the buildings here in question are used for the purposes of the business carried on by the occupier. It was said that it was not in accordance with the language of the rule to hold that such buildings should be included in the valuation. I cannot assent to that argument. Take for example the case of a farmhouse, which is specifically contemplated by the Legislature, and is to be taxable at a lower rate, where used for the purposes of husbandry only; if there were in connection with the farmhouse a stable, used not as stabling for horses kept for the benefit of the occupiers of the farmhouse, regarded merely as dwellers therein, but as stabling for horses kept for the purpose of the cultivation of the adjoining farm, that stable could not, I think, be excluded from consideration, being part of the offices occupied and used in connection with the farmhouse under rule 2. This is the view of the Act which has been taken in the Courts of Scotland. In *Young* v. *Douglas* (1) the question arose with regard to a building used as an hotel, which was occupied together with stables at some distance. The hotel and the stables were held under different leases and at separate rents. It was held that, the hotel being taxable as an inhabited house, the stables must be included in the valuation for the purposes of the duty, although they were not used for what may be called residential purposes, but for the purposes of the business of the hotel. The same view was taken in the case of *Cheape* v. *Kinmont* (2), which related to a group of buildings used as kennels and stables in connection with a hunt. The general ground upon which those decisions were based appears to have been that, where there are buildings occupied together with a building which is admittedly a dwelling-house, and used for the same purposes for which the dwelling-house is used, the whole of the buildings are subject to the tax. I do not see my way to differing from that view, and I think therefore that the buildings in question in this case ought to be dealt with together with the main building for this

(1) 1 Tax Cases, 227.

(2) 2 Tax Cases, 418.

purpose, and their value taken into consideration in arriving at the amount of the duty.

MATHEW L.J. I am of the same opinion. As was pointed out by my brother Vaughan Williams during the argument, inhabited house duty was formerly imposed by virtue of s. 1 of 48 Geo. 3, c. 55, Sched. B of which contained the rules in accordance with which the duty was to be charged. The tax is now imposed by the House Tax Act, 1851, in substantially the same terms, and the rules of Sched. B of 48 Geo. 3, c. 55, are incorporated by s. 2 of the Act. It was contended for the appellant that, the subject-matter of the tax being a dwelling-house, unless the outlying buildings in the present case could be said to form one building with the dwelling-house, they were not assessable. But it does not seem to me to be necessary, in order that these buildings should be assessable, that we should come to the conclusion that they form one structure with the dwelling-house. Our attention has been called to the words of Sched. B of 48 Geo. 3, c. 55. That schedule is headed "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain according to the value thereof, and of the offices and lands to be charged therewith." Those words appear to me to be fatal to the suggestion that only that which forms one structure with the dwelling-house is to be taxed. The schedule proceeds: "For every such inhabited house which, with the household and other offices, yards, and gardens therewith occupied and charged, are or shall be worth the rent hereinafter mentioned by the year, there shall be charged the yearly sums following." Then the schedule goes on to make the matter still clearer, for by rule 2 it is provided that "every coach-house, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure-grounds belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house." It appears to me that the language so used at once disposes of the point that no buildings can be the subject of

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the tax unless they form one structure with a dwelling-house. Then, it was further contended that the buildings on the far side of the wall do not come within the description of buildings contained in the 2nd rule. In my opinion the language of that rule was intended to be as comprehensive as possible. The words are "all other offices," meaning everything whatever of a similar character to those matters previously specified. There can be no doubt that the additional buildings in this case are used and occupied for the same purposes as the house itself. The house was used and occupied as a boarding-school, and these buildings all appear to have been intended for the more convenient occupation of the house and for the additional comfort of the pupils residing in it. I see no reason for restricting the meaning of rule 2 of Sched. B of 48 Geo. 3, c. 55, in the manner suggested.

Appeal allowed.

Solicitors for appellant: *Thorne & Welsford.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

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Bankruptcy—Practice—"Costs of Petitioning Creditor"—Costs of rehearing Petition—"Actual Expenses incurred in realizing Assets"—Trustee's Solicitors' Costs—Priorities—Locus Standi of Solicitor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 57—*Bankruptcy Rules,* 1886, *rr.* 125, 183.

By rule 125 of the Bankruptcy Rules, 1886, the assets remaining, after payment of the actual expenses incurred in realizing any of the assets of the debtor, are liable, subject to any order of the Court, to the payment of—first, the taxed costs of the petitioning creditor; secondly, the trustee's necessary disbursements other than the actual expenses of realization heretofore provided for; and, thirdly, the costs of any person properly employed by the trustee:—

Held, that the actual expenses of realizing the assets mean strictly the costs of a sale of any of the assets, and do not extend to the trustee's solicitors' bill of costs:

Held, also, that the "taxed costs of the petitioning creditor" include as a rule the costs of a rehearing by the registrar and the Court of Appeal.

Where more than a year elapsed between the date of a receiving order and an application for a rehearing, and in the meantime the trustee had incurred considerable costs in tracing and getting in the bankrupt's assets and in successful litigation for that purpose, and the assets were insufficient to pay in full the bill of costs of the solicitors properly employed by the trustee in the above matters, and also the petitioning creditor's costs of the rehearing in the Court below and on appeal:—

Held, that no sufficient reason was shewn for varying the order of priorities prescribed by the rule.

Quære, whether a solicitor properly employed by a trustee in bankruptcy can apply direct to the Court for payment of his bill of costs out of the estate, or whether he must apply for leave to use the name of the trustee for that purpose.

THIS was an application that raised a question as to the priorities according to which certain costs were to be paid out of the bankrupt's estate under these circumstances.

On July 30, 1901, a receiving order was made against the debtor on a creditor's petition, and on November 8, 1901, the debtor's appeal against the receiving order was dismissed by the Court of Appeal. In the meantime the debtor had been adjudicated bankrupt, and a Mr. Harrower was appointed the trustee with a committee of inspection, and he, with the

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consent of the committee, appointed Messrs. Wingfield & Blew to act as his solicitors; and the petitioning creditor's taxed costs of the petition and of the appeal were paid out of the estate.

On July 1, 1902, the registrar refused an application by the debtor to rescind the receiving order and to rehear the petition, and on appeal the Court of Appeal on November 14, 1902, refused to rescind the receiving order, but directed the petition to be reheard, and ordered the costs of the petitioning creditor to be paid out of the estate. Shortly afterwards the petition was reheard at great length by the registrar, who confirmed the receiving order, and an appeal by the debtor was dismissed by the Court of Appeal, who ordered the costs of the petitioning creditor of the rehearing in the Court below and in the Court of Appeal to be paid out of the estate.

In the meantime, between July, 1901, and July, 1902, Mr. Harrower, as trustee, had incurred considerable costs in tracing and getting in assets belonging to the bankrupt's estate, consisting of shares and debentures in various companies standing in the names of other persons for the bankrupt. There were lengthy private examinations, and much litigation ensued, which was successful, and eventually Mr. Harrower sold the bankrupt's assets to a company for 2000*l.*

On October 2, 1902, a Mr. Whinney was appointed the trustee in bankruptcy in the place of Mr. Harrower, who had resigned in the previous August through ill-health.

On December 2 Wingfield & Blew's bill of costs as solicitors to Mr. Harrower, whilst trustee, were taxed and allowed at 1380*l.* 0*s.* 1*d.*, of which 552*l.* 6*s.* 5*d.* were out of pocket payments. The work done for which the allocatur was issued was summarized as follows:—

	£	*s.*	*d.*
Costs of preliminary private examination of witnesses .	414	10	10
Costs of actions to restrain dealings with shares, cash, and debentures	643	18	5
Costs of and incidental to sale of assets	38	0	0
Costs in general matters in the bankruptcy, including admission and rejection of proofs of creditors, items in criminal proceedings up to date of the order to prosecute, taxing fees, &c.	283	10	10
	£1380	0	1

The assets were now represented by a sum of about 1890*l.*, which was insufficient to pay in full both the 1380*l.* due to Wingfield & Blew and also the petitioning creditor's taxed costs of the rehearing in the Court below and in the Court of Appeal, and Wingfield & Blew now applied that their taxed costs might be paid out of the 1890*l.* in priority to the petitioning creditor's costs of the rehearing.

Buckmaster, K.C., and *P. Van Neck*, for the application.

C. A. Russell, K.C., and *Disturnal*, for the petitioning creditor, took the preliminary objection that the applicants had no locus standi. These solicitors were employed by the late trustee, Mr. Harrower, and must look to him for payment. It is Mr. Harrower who is entitled to be indemnified out of the estate, and he ought to apply for payment of these costs: Bankruptcy Act, 1883, s. 57; *Ex parte Harper* (1); and if he is entitled to be paid, he can come and assert that right. The present trustee is not liable to these solicitors at all.

Buckmaster, K.C., for the application. *Ex parte Harper* (1) is no authority for saying that this application cannot be made. Under rule 125 the Court has power to order payment of these costs to the solicitors. The present trustee did not object to pay them; but in the face of the opposition of the petitioning creditor he did not see his way to do it.

Muir Mackenzie, for the present trustee. The application is not opposed, but it is submitted that in any event the "necessary disbursements" both of the present and late trustee must be paid out of the estate in priority to any payment to the solicitors.

C. A. Russell, K.C., in reply.

WRIGHT J. I cannot see any substance in this objection. If the trustee and solicitor were at arm's length, the solicitor could obtain leave to use the name of the trustee on giving him a proper indemnity. And where a new trustee has been appointed, I do not see that that is a necessary bar to the solicitor being the proper person to apply to the Court for

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(1) (1882) 20 Ch. D. 685.

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payment of his bill of costs, nor why the Court should not upon the Act and the rules order payment to him of his bill of costs. In the present case the objection is purely technical. The present trustee does not oppose, and if the objection were pressed I should direct the trustee's name to be added.

[The objection was not pressed.]

Buckmaster, K.C., for the application. The 183rd rule directs that when a receiving order is made the taxed costs of the petitioner shall be paid out of the estate in the order of priority prescribed by the rules, and rule 125 prescribes the scale of priorities. (1) It is contended that all these costs have been incurred in realizing the estate. The "assets remaining" are the net assets after payment of the expenses of realization. These costs are part of the expenses of realization. The private examinations enabled the trustee to trace and get in the bankrupt's property, and to bring actions which were successful; and his proceedings have produced the fund now available for payment of costs. But if these costs are not strictly "expenses of realization," it is submitted that under the circumstances they should have priority over the petitioning creditor's costs of the rehearing. Lastly, the "taxed costs of the petitioner" mean the costs of the original hearing of the petition and the appeal therefrom. Rule 183 points that way, and these costs have been paid. Rule 125 was never intended to apply to a rehearing like this, more than a year after the date of the receiving order, and when in the meantime heavy costs had been incurred by the trustee in getting in the estate.

C. A. Russell, K.C., for the petitioning creditor. None of the items in the applicants' bills of costs, except the sum of 38*l.*, which is not objected to, are "actual expenses incurred in realizing the assets" within the meaning of rule 125. The costs of a solicitor employed by the trustee, except so far as they are costs of a sale of the assets, are not "actual expenses incurred" in realizing the estate. Those words mean realization proper, and do not extend to the trustee's costs in general. Next, the petitioner's costs of a rehearing stand in the same position as his costs of the original hearing of the petition. There is nothing in rule 183 to militate against that view. No doubt the Court has a discretion in the matter, but it must be exercised having regard to the scale of priorities prescribed by rule 125. Here no sufficient reason is shewn for varying the order of priorities. As to the position of the solicitors, *Ex parte Harper* (1) is in point. Anything that could be urged against the former trustee for refusing him his costs out of the estate is also an objection to the solicitors having their costs.

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(1) Rule 125 of the Bankruptcy Rules, 1886, provides: "The assets in every matter remaining, after payment of the actual expenses incurred in realizing any of the assets of the debtor, shall, subject to any order of the Court, be liable to the following payments, which shall be made in the following order of priority, namely:—

* * * *

"The taxed costs of the petitioner;

* * * *

"The trustee's necessary disbursements other than actual expenses of realization heretofore provided for;

"The costs of any person properly employed by the trustee with the sanction of the committee of inspection."

Buckmaster, K.C., in reply.

WRIGHT J. Without expressing a definite opinion, I wish to reserve the right of the Court to say that an application of this kind should be made by or in the name of the trustee. It might be very inconvenient if any person might come and ask to vary the ordinary rule as to priorities. In the present case, however, I do not think it signifies at all. On the main question I see no reason whatever to think that the expenses incurred by Messrs. Wingfield & Blew, the solicitors who make the application, are "the actual expenses of realizing any of the assets of the debtor," with the sole exception of the 38*l.* which is not disputed. Then is there any reason shewn for altering in favour of these solicitors the statutory order of priorities? I call it statutory, for the rules are to be read as part of the Act. It is enough for me to say that there is no sufficient reason shewn for altering the order of priorities. I should require very much fuller information as to the items of the solicitors' claim, and as to the conduct and views of the former trustee, before I should think it right to alter the prescribed order of

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(1) 20 Ch. D. 685.

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Wright J.

priorities. Then there remains the question, which is perhaps not free from difficulty, whether under the peculiar circumstances of this case the words in rule 125, "the taxed costs of the petitioner," include the costs incurred in the rehearing of the receiving order. It seems to me that on principle I ought to hold that "the taxed costs of the petitioner" do include costs to which he is subjected by a rehearing, both in the Court below and on appeal, against the receiving order. They are all part of the necessary expenses to which he is subjected in retaining the receiving order. I do not consider that these costs are to be treated in any other way than as costs of the petitioner. I must make a declaration that the words "taxed costs of the petitioner" include for the purpose of this case the costs of the rehearing and of the appeal against the registrar's order thereon. I make no order varying the priorities, and nothing that I have said will affect the right of the trustee to be paid his disbursements in accordance with the prescribed scale. The application of Messrs. Wingfield & Blew has failed so far as this application is concerned and must be dismissed with costs; but there will be liberty to them to attend the taxation of the petitioning creditor's costs of the rehearings.

Solicitors for Wingfield & Blew: *Blair & Girling.*
Solicitors for petitioning creditor: *Church, Rendell & Co.*
Solicitors for trustee: *Maples, Teasdale & Co.*

H. L. F.

STONE & CO. *v.* THE MIDLAND RAILWAY COMPANY.

1903
Jan. 26.

Railway—Contract of Carriage—Conveyance of Goods by Passenger Train—Collection and Delivery—Inclusive Charge for Carriage and Collection of Goods—Special Act—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.

A schedule of the statutory maximum rates and charges authorized to be taken by a railway company for the conveyance of goods contained a provision that the company should not be under obligation to carry non-perishable goods by passenger train. The company announced to the public their willingness to carry tailors' clothing by passenger train at a "collected and delivered" rate specified in a scale of charges which they published. The plaintiffs, who were common carriers at Bristol, sent parcels of tailors' clothing from Bristol to Southampton by the company's passenger train, having themselves collected the goods at Bristol and handed them over to the company at their passenger station. The plaintiffs paid to the company, under protest, the scale charge; and brought an action against them for money had and received, claiming to be entitled to a rebate from the defendants in respect of the collection of the goods at Bristol:—

Held, that the plaintiffs were not entitled to any rebate, and that the action was not maintainable.

Appeal from the Bristol County Court.

The action was brought to recover 1*s*., money alleged to have been received by the defendants to the use of the plaintiffs.

The facts, so far as material for the purposes of this report, appeared from the county court judge's notes, and were as follows:—

The plaintiffs were common carriers at Bristol. Since April, 1900, they had collected from the warehouses at Bristol heavy goods and parcels for transit by the defendants' railway to Southampton Docks, and had handed them over to the defendants at their goods or passenger station, as the case might be, at Bristol. An order made by the Board of Trade and confirmed by the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxix.), contains a schedule of the maximum rates and charges which the

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defendants are authorized to charge for the conveyance of merchandise (including clothing) by merchandise train, and of the maximum rates and charges authorized in respect of perishable merchandise carried by passenger train. Part V., clause 3, provides: "The company shall not be under obligation to convey by passenger train, or other similar service, any merchandise other than perishables."

The defendants carried parcels by passenger train from Bristol under two scales of charges—one scale applying where they undertook the ordinary liability of common carriers, and the other applying where goods were carried at "owner's risk." The two scales were set out in a book published by the defendants, entitled, "List of Rates Arrangements for the Conveyance of Parcels by Passenger Trains from Bristol." The "owner's risk" scale had appended to it a description of a large number of articles, including "Tailors' unfinished and finished clothing," and against this item were placed the letters "*c*, *d*." Those letters were explained by foot-notes as follows: "*c* including collection," and "*d* including delivery." The plaintiffs had notice of the terms, as stated in the book, upon which the railway company were willing to carry tailors' goods by passenger train. [The county court judge came to the conclusion that the proper inference of fact to be drawn from the evidence was that the charge for the carriage of tailors' goods by passenger train at "owner's risk" included a charge for collection and delivery.] On August 7, 1901, the plaintiffs collected and handed over to the defendants at their passenger station at Bristol three boxes of tailors' goods to be carried by passenger train at owners' risk, and they paid to the defendants, under protest, the sum of 1*l.* for the carriage of the boxes to Southampton, being the amount of the scale rate, which was 3*s.* 6*d.* per cwt. The plaintiffs claimed to be entitled to a rebate of 1*s.* in respect of the collection of the goods by them, and sought to recover that sum as money had and received by the defendants to their use.

The county court judge gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Cripps, K.C. (*W. J. Noble* with him), for the appellants. These were non-perishable goods, and the defendants were, by reason of the Order Confirmation Act of 1891, under no obligation to carry them by passenger train. The defendants, therefore, if they chose to carry tailors' goods by passenger train, were only bound to carry them according to the profession they held out to the public, their profession here being, not to give a "station to station" rate, but to carry from the warehouse at Bristol at one end to the Southampton Docks at the other. So long, at any rate, as they carry according to their profession equally for all persons, they have an entire discretion as to the terms on which they carry. Assuming, but for the purposes of this argument only, that the county court judge was right in finding as a fact that the rate at which they profess themselves willing to carry includes a charge for collection and delivery, and that they do not perform those services gratuitously, his finding is immaterial. They cannot be compelled to dissect the rate and to allocate part of it to carriage and part to collection; nor can they be compelled to make any charge for collection if they choose to do it gratuitously: *New Union Mills Co.* v. *Great Western Ry. Co.* (1); see the judgment of Collins J., where he cites with approval the dictum of Wills J. in *Tomlinson* v. *London and North Western Ry. Co.* (2) Where a railway company are not bound to carry particular goods at all, no terms which they impose as a condition of the carriage of those goods can be said to be unreasonable: *Dickson* v. *Great Northern Ry. Co.* (3), judgment of Lindley L.J.

Sect. 90 of the Railways Clauses Consolidation Act, 1845 (4)—the "equality clause"—does not apply to this case, because the toll or rate charged by the defendants for the carriage of tailors' goods by passenger train is not a toll or rate authorized to be taken by any special Act; nor is there any statutory toll

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(1) [1896] 2 Q. B. 290, at p. 295.

(2) (1890) 7 R. & C. T. Cas. 22.

(3) (1886) 18 Q. B. D. 176, at pp. 182, 183.

(4) 8 & 9 Vict. c. 20, s. 90, enacts that it shall be lawful for the company, subject as therein mentioned, to alter or vary "the tolls authorized by the special Act to be taken . . . . as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate. . . . "

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or rate imposed in respect of those goods so carried. It may be conceded that if the goods were carried by goods train, and so came within s. 90, the plaintiffs would be entitled to recover the rebate they claim as money had and received to their use, because the charge would be a charge which the defendants were authorized to make under the special Act, and they might be under an obligation to give a "station to station" rate as distinct from a "collected and delivered" rate. The principle of the decisions in *Baxendale* v. *Great Western Ry. Co.* (1) and *Great Western Ry. Co.* v. *Sutton* (2) would then apply. In the latter case the general principle, with respect to the rights of individuals who are common carriers as against railway companies, is clearly stated by Blackburn J. (3) It is not alleged by the plaintiffs in the present case that the rate has been charged unequally to different persons; and if their complaint is that the defendants did not give "reasonable facilities" for the carriage of the goods in question, as required by s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), then the remedy is by application to the Railway and Canal Commissioners; the plaintiffs cannot maintain this action for money had and received.

Weatherly (*Balfour Browne, K.C.*, with him), for the respondents. The county court judge's decision was right. He has found as a fact that the rate charged by the defendants included a charge for collection. The decisions, therefore, in *Garton* v. *Bristol and Exeter Ry. Co.* (4) and *Baxendale* v. *Great Western Ry. Co.* (1) apply, and the plaintiffs are entitled to recover the rebate of 1*s.* as money had and received to their use, on the ground that they have performed the service of collection for which they have been charged by the defendants. *Garton's Case* (4) is a distinct authority in the plaintiffs' favour. It decided that if any person, whether a carrier or not, brings to the railway company a parcel in respect of which the company make a charge for collecting and delivering, and he is willing to pay a reasonable price for carriage from station to station, then he is entitled to be credited with the amount which is due for, or may be allocated to, the cartage to the station. The defendants are authorized, either by statute or otherwise, to carry tailors' goods by passenger train, and the distinction they seek to draw between carriage by goods train and carriage by passenger train is purely arbitrary. In *Baxendale's Case* (1) there was no fixed maximum charge for the carriage of small parcels, and it was held that those who rendered the service of cartage, and were willing to pay a reasonable rate for carriage from station to station, were entitled to the rebate. By s. 203 of the defendants' special Act of 1844 it is provided: "All tolls for the use of the railway shall at all times be charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, and all tolls or charges for conveyance by the company or for the use of carriages or locomotive power shall at all times be charged equally to all persons." The defendants' power to make the contract here is derived from those provisions of the special Act. It is not suggested that they charge unequally to different persons; but they compete with other carriers upon the road, as distinct from the rail, and in that sense there is unfairness and inequality.

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(1) (1863) 14 C. B. (N.S.) 1; (1864) 16 C. B. (N.S.) 137.

(2) (1869) L. R. 4 H. L. 226.

(3) L. R. 4 H. L. at pp. 236, 237.

(4) (1861) 1 B. & S. 112; 30 L. J. (Q.B.) 273.

Cripps, K.C., in reply, referred to *Watson, Todd & Co.* v. *Midland Ry. Co. and London and North Western Ry. Co.* (2)

LORD ALVERSTONE C.J. I think the question raised in this case is reasonably clear. The action is, in effect, brought by the plaintiffs to compel the railway company to charge a station to station rate, or at any rate to compel them to charge a rate which excludes collection at the sending end. The argument for the plaintiffs would be perfectly well founded if the charge which the railway company are making could be brought within s. 90 of the Railways Clauses Consolidation Act, 1845. If the plaintiffs could have shewn that the company were charging in respect of the same goods a different amount, or allowing, let us say, a rebate to other persons who took their goods to the Bristol station, then the question which arose in *Garton* v. *Bristol and Exeter Ry. Co.* (1), *Baxendale* v. *Great Western Ry. Co.* (2), *Great Western Ry. Co.* v. *Sutton* (3), and in other cases, would have arisen here—namely, whether there had not been a breach of s. 90—the equality clause. But, when the facts of this case are ascertained, I think that no question arises under s. 90. In order to make out their claim the plaintiffs must establish that they are entitled to have the amount charged in respect of the goods which they carry fixed as though the railway company had fixed, or were bound to fix, a station to station rate, or at any rate a rate which excluded collection at the sending end. The goods in question were non-perishable goods carried by passenger train. It must be taken that there is no statutory obligation on the railway company to carry those goods by passenger train. That being so, the company have made an announcement which, if acted upon, amounts to a contract with persons who send their goods under it. The announcement is of certain rates, being the rates in this case, for which they will take tailors' finished and unfinished goods, and will collect them at the sending end and deliver them at the receiving end. That is the only contract which it can be suggested they have made. It is said on behalf of the plaintiffs that because they choose not to avail themselves of that rate, but choose to bring goods to the station themselves, they can claim the benefit of the rate less a reduction to be assessed by the county court judge as a quantum meruit for carting those goods to the station. There are, in my opinion, several objections to this contention. In the first place, if the complaint is that the company will not receive goods at their station, or that they will not give a proper rate for the carriage of those goods, the plaintiffs' remedy must be under the Railway and Canal Traffic Acts; for it is, I believe, still law that no action can be brought for a mere refusal to provide proper facilities under those Acts.

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(1) 14 C. B. (N.S.) 1; 16 C. B. (N.S.) 137.

(2) (1896) 9 R. & C. T. Cas. 90.

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(1) 1 B. & S. 112; 30 L. J. (Q.B.) 273.

(2) 14 C. B. (N.S.) 1; 16 C. B. (N.S.) 137.

(3) L. R. 4 H. L. 226.

Undoubtedly, under some circumstances, where an illegality has been established and money paid under protest, it can be recovered; but where the complaint only is that the company have not quoted a rate, or will not give facilities whereby the goods can be carried when they have been carted to the station, that complaint would not be ground for an action like this. The plaintiffs have not, in my view, been compelled to pay any sum in excess of what the company are entitled to charge. There is nothing illegal in such an arrangement as has been made here. A railway company carrying on their business as carriers are entitled to say, "Although in law we cannot be compelled to carry these goods by passenger trains, we will yet undertake to carry them on certain terms and at certain prices." The terms and price being fixed, the plaintiffs can, if they choose so to do, avail themselves of that undertaking, or holding out, of the company. The plaintiffs have not chosen so to avail themselves, and it cannot, I think, be said that, because they ask the company not to perform the contract which the company have said they would perform, but ask them to perform another contract which the company have neither announced their willingness to perform, nor can be compelled to perform under any statute, the plaintiffs have been compelled, in order to get their goods carried, to pay money which they ought not to have been asked to pay. The railway company have in effect said that they would only carry non-perishable goods by passenger train on the terms that they should collect and deliver the goods and make a fixed charge for that combined service.

This case comes, I think, within the dictum, if it was not more than a dictum, of my brother Wills, which is cited in *New Union Mills Co.* v. *Great Western Ry. Co.* (1) It was to the effect that, the railway company being lawfully able to contract to perform certain services for an all-round sum, the trader could not make it a grievance that they did for nothing that which he said they ought to be obliged to do for so much money.

The grounds of my decision in this case are that the railway company, not being compelled to carry non-perishable goods by passenger train, have expressed their willingness to carry those goods on certain terms; that it is open to anybody to avail themselves of those terms, and there is no evidence of any breach of s. 90 of the Railways Clauses Consolidation Act, 1845, nor any evidence that the company have charged the plaintiffs more than they have charged any other persons in respect of the same services.

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(1) [1896] 2 Q. B. 290, at p. 295.

I am of opinion that the appeal should be allowed and judgment entered for the defendants.

WILLS J. I am of the same opinion. Two principles, which cannot, I think, be contested, apply here, and the combined effect of them is to make the case perfectly clear. One is, that there is no statutory obligation to carry these goods by passenger train; the other, that it is not ultra vires for the company to carry them if they so choose. The combined effect is that, so far as concerns the carriage of articles of this kind by passenger train, the company are on exactly the same footing as a private individual. If a private individual were to say, "I will carry these goods, but I insist on having one of the profitable parts of the transaction—namely, the collection—in my own hands, and I am ready to carry them on the terms that I charge one rate to include that service," how could he be compelled to make a fresh contract which would exclude a part of the services to which he attached importance? To give effect to the contention for the plaintiffs would be to say that, although they performed the service voluntarily and without any request from the railway company, the latter were bound to pay the plaintiffs for it. I think the matter is perfectly clear upon principle. Counsel for the plaintiffs laid great stress upon that section of the railway company's special Act which provides that, to put it shortly, they shall administer equality to everybody in respect of all their charges and tolls of whatsoever nature. That section is, perhaps, somewhat wider in its terms than s. 90 of the Railways Clauses Consolidation Act, 1845; but, to my mind, it makes no difference, because the railway company here are not making different charges to different people; they are saying to all people, "The only way in which you can get us to carry these goods by passenger train is by entering into the contract which is specified in our published notices." Sect. 90 of the Act of 1845 would, if it applied, give the plaintiffs the right to recover the money they claim as money had and received to their use; but it applies only to tolls authorized to be taken by a special Act, and no special Act authorizes these tolls or charges to be taken; on the contrary, there is a provision that the company are not bound to carry this kind of goods by passenger train at all. On these grounds I think that the defendants are entitled to our judgment.

CHANNELL J. I agree. It is admitted that the service of collection was rendered by the plaintiffs voluntarily, and not at the request of the railway company, and it therefore seems to me that the plaintiffs can only recover in respect of their claim if they can make out that they were entitled as of right to have their goods carried for a less sum than they have in fact paid, and they do not make out that they were so entitled. It follows that their payment was voluntary, and they have no right to recover any part of it.

Appeal allowed. Leave to appeal.

Solicitors for plaintiffs: *Burgess, Cosens & Co., for Charles E. Isbell, Bristol.*

Solicitors for defendants: *Beale & Co.*

W. A.

1903
March 4, 5, 6, 11.

PRICE & CO. *v.* UNION LIGHTERAGE COMPANY.

Carrier—Lighterman—Contract—Exemption for "Loss of Goods which can be covered by Insurance"—Negligence of Carrier's Servants—Liability of Carrier.

Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost:—

Held, that the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants.

Commercial Cause, tried before Walton J., without a jury.

The plaintiffs claimed damages for breach of a contract for the carriage by the defendants in their barge *Iron King* of a cargo of oil from the Roumanian Oil Trust Company's wharf at Thames Haven to Belvedere, whereby the barge was sunk and the oil, of the value of 371*l.*, was lost.

There was no written contract for the carriage of the oil, but it was admitted that the lighterage was subject to a clause which was on a printed form used by the defendants, and was as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman."

The plaintiffs' oil was loaded on the defendants' barge at the wharf, and the barge then remained moored to the wharf until after low water. As the barge rose with the rising tide, its gunwale was caught under a projecting part of the face of the wharf, and was so held down as the tide rose that she sank, and the oil was thereby lost.

The plaintiffs alleged that the loss was caused by the negligence of the defendants' lightermen in leaving the barge unattended. The defendants contended that by the terms of the contract they were exempt from liability for the loss even if caused by the negligence of their servants.

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J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs.

Scrutton, K.C., and *Loehnis*, for the defendants.

The arguments, and the cases cited, sufficiently appear from the judgment of Walton J.

Cur. adv. vult.

March 11. WALTON J. read the following judgment:—In this case the plaintiffs seek to recover damages from the defendants for the loss of a quantity of oil which was shipped at a jetty at Thames Haven in a barge of the defendants, under a contract between them and the plaintiffs by which the defendants agreed to receive and lighter the oil for the plaintiffs to Belvedere up the river Thames. The oil was shipped about high water early in the afternoon of October 31, 1902, and the barge when loaded was allowed to remain moored to the jetty until after low water. As the barge rose with the rising tide its gunwale caught under a projecting part of the face of the jetty, against which it was lying, and as the tide rose the barge was held down and so was submerged and sunk. The plaintiffs allege that the loss was caused by the negligence of the defendants' lightermen in leaving the barge unattended during the rise of the tide, or by the unseaworthiness of the barge, or by both causes. In my opinion the plaintiffs have failed to prove that the barge was unseaworthy, and it follows that if they are entitled to succeed at all it must be on the ground that the loss was caused by the negligence of the defendants' servants. As to this the defendants say that, by the terms of the contract, they are exempt from liability for a loss so caused; and they say further that there was no negligence.

It is necessary, therefore, to ascertain what the terms of the contract were. The contract was not contained in any written document, but it is admitted that by the course of dealing between the parties the lighterage was subject to the terms of a clause which was printed on the forms of stationery used by the defendants in their business, and is as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman."

In dealing with the question of construction, I shall assume that the loss was brought about by the negligence of the defendants' lightermen. Upon the question of construction the controversy between the parties is as to whether the clause in question exempts the lighterage company from liability for a loss caused by the negligence of their servants. It is plain that such a loss as occurred in the present case is covered by an ordinary marine policy. The loss of cargo by the accidental sinking of a barge is a loss by perils of the sea, and is recoverable from underwriters as such, whether brought about by the negligence of the lightermen or not. It may be, and probably is, true that when the clause speaks of losses which can be covered by insurance it means losses which can be covered by insurance in the ordinary course of business. Negligence of lightermen is not one of the risks named in the common forms of policies on goods, but there is no doubt it can be insured against specifically without any difficulty, and, as I have said, a loss such as occurred in the present case is covered even by the ordinary form of a marine policy on goods whether the loss was brought about by negligence or not. It follows that the words of the clause, "loss of goods which can be covered by insurance," are wide enough to include the loss which occurred in this case, even assuming that it was caused by negligence. And, if it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms. In *Phillips* v.

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Clark (1) the damage was by leakage and breakage, and by the bill of lading the shipowner was not to be "accountable for leakage and breakage"; but it was held that, if the leakage and breakage were due to the negligence of the servants of the shipowner, he was not protected from liability by the exemption in the bill of lading. In that case Willes J. said (2): "The introduction of the words in the margin of the bill of lading is sufficiently accounted for by the fact that without them the defendant would have been bound to the strictest care, so as to deliver the goods at the end of the voyage in the same state and condition as they were in when he received them, without reference to negligence. It appears from the observations of Lord Wensleydale in *Walker* v. *Jackson* (3) that, in the absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them—as is pointed out by some members of the Court in *Wyld* v. *Pickford*. (4) The defendant gets rid of that liability in the present case by the introduction of the words 'not accountable for leakage or breakage,' but not of the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him . . . . The true meaning of this contract is: 'I will take all reasonable care of the goods, but will not be accountable for a loss arising from leakage or breakage, such as usually happens without the exercise of extraordinary care.' The owner engages only to abstain from negligence." In *Steinman* v. *Angier Line* (5) the exemption in the bill of lading was from liability for losses caused by "thieves of whatever kind, whether on board or not"; but the Court held that this did not protect the shipowner from liability for a theft committed by his servants. The general rule is stated by Bowen L.J. in his judgment as follows: "This question of construction must be decided on the broad principle which has been so long and so consistently invoked in the interpretation of contracts with carriers by sea as well as land, viz., that words of general exemption from liability are only intended

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(1) (1857) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

(2) 2 C. B. (N.S.) at p. 163.

(3) (1842) 10 M. & W. 161, 169.

(4) (1841) 8 M. & W. 443.

(5) [1891] 1 Q. B. 619.

(unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly, in *Grill* v. *General Iron Screw Collier Co.* (1), an exception in a bill of lading of 'accidents of whatever nature or kind soever' was held not to cover a collision caused by negligence of master and crew: see also *Phillips* v. *Clark* (2); *Czech* v. *General Steam Navigation Co.* (3) It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils: the exception, in other words, limits the liability, not the duty." I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words. I may refer to *Mitchell* v. *Lancashire and Yorkshire Ry. Co.* (4) as another illustration of this rule. There the carriers, who were the Lancashire and Yorkshire Railway Company, after the goods had arrived at their destination, gave notice to the consignees that the railway company held the goods to the order of the consignees, "not as carriers, but as warehousemen, at owner's sole risk." But it was held that the words "at owner's sole risk" amounted to no more than a notice that the railway company after giving such notice undertook no liability as insurers, and did not relieve them from liability for a loss arising from the negligence of their servants. It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well known as a negligence clause. I think that this view of the law as applicable to the present case is, at all events, supported by the judgment of the House of Lords in *Sutton* v. *Ciceri* (1); and I may point out, as Lord Herschell did in that case, that the clause in question seems to refer to conveyance in contradistinction to insurance. I think that in obedience to the rule laid down in the cases which I have cited the clause must be read as meaning, "I will use reasonable skill and care in the conveyance of goods, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance with underwriters." In my opinion, therefore, if the loss was in fact caused by the negligence of the lightermen, the defendants are liable. It may be convenient to add a reference to the case of *Compania de Navigacion La Flecha* v. *Brauer* (2), in which the Supreme Court of the United States had to consider the effect of the English authorities upon this question. I have now to consider whether there was negligence in fact. [The learned judge then reviewed the evidence, and found as a fact that the barge had been sunk owing to the negligence of the defendants' servants.]

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(1) (1866) L. R. 1 C. P. 600; (1868) L. R. 3 C. P. 476.

(2) 26 L. J. (C.P.) 168.

(3) (1867) L. R. 3 C. P. 14.

(4) (1875) L. R. 10 Q. B. 256.

I think that the defendants are liable for the loss thereby occasioned. There will be judgment for the plaintiffs for 370*l*.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitor for defendants: *C. E. Harvey.*

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(1) (1890) 15 App. Cas. 144.

(2) (1897) 168 U. S. 104.

W. A.

1903
March 26.

KIRKLAND *v.* PEATFIELD.

Statute of Limitations—Devise of Land in Trust for Sale—Mortgage of Reversionary Interest in Proceeds—Action on Covenant in Mortgage Deed—"Money charged upon or payable out of Land"—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A testatrix died having devised her real estate to trustees in trust for A. for life, and after A.'s death in trust to sell and divide the proceeds among the defendants. The defendants joined in executing a mortgage of their reversionary interest in the property to the plaintiff to secure an advance. The mortgage deed contained a joint and several covenant to repay the loan with interest. More than twelve years and less than twenty years after the last payment of interest or acknowledgment by the defendants the plaintiff brought his action to recover the amount of principal and interest due under the covenant in the mortgage deed. A. was still living at the date of the action:—

Held, that the money payable under the covenant was money "charged upon or payable out of land" within the meaning of s. 8 of the Real Property Limitation Act, 1874, and that the limitation of twelve years imposed by that section applied to the personal action upon the covenant, even though the subject-matter of the mortgage was a reversion, and though that reversion had not yet fallen into possession at the date of the action.

Trial before Wright J. without a jury.

By her will dated January 18, 1864, Betsy Lees gave and devised certain specified lands and hereditaments and all other her real estate whatsoever and wheresoever to trustees to the use of Anne Lees Peatfield and her assigns during her life, and after the death of Anne Lees Peatfield to the use of James Henry Lees Peatfield for ever. And in case the said J. H. L. Peatfield should die under twenty-one without issue, the testatrix gave and devised all her real estate to trustees upon trust that they "do and shall as soon as conveniently may be" sell the same, and the testatrix directed that the trustees should stand possessed of the proceeds upon trust to pay and divide the same equally between all the nephews and nieces of the testatrix then living, share and share alike.

Betsy Lees died on August 22, 1864.

J. H. L. Peatfield died under twenty-one and without issue on September 20, 1868.

Anne Lees Peatfield (the tenant for life) was still living at the date of the action.

By an indenture of mortgage dated May 10, 1881, and made between six nephews and nieces of the testatrix (including the two defendants) of the first part, Jane Peatfield, the mother of the defendants, of the second part, and the plaintiff of the third part, after reciting the will, in consideration of 100*l.* paid to the parties of the first part by the plaintiff, the said parties assigned to the plaintiff all the share, estate, right, and interest of each of them under the will, subject to a proviso for redemption on repayment of the 100*l.* on November 10, 1881, with interest. The deed contained a joint and several covenant by the parties of the first part and second part to repay the 100*l.* on November 10, 1881, and in default of payment to pay interest half-yearly. The last payment of interest was made on October 18, 1882.

On October 7, 1902, the plaintiff brought the action to recover the sum of 203*l.* 1*s.* 5*d.*, the amount of the principal and interest due under the covenant in the said mortgage deed.

The defendants contended that the action was barred by the Real Property Limitation Act, 1874.

Stanger, *K.C.*, and *F. O. Robinson*, for the defendants. This is a claim to recover a sum of money "charged upon or payable out of land" within s. 8 (1) of the Real Property Limitation Act, 1874: *Bowyer* v. *Woodman*. (2) Sect. 8 applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the security: *Sutton* v. *Sutton*. (3) The period of limitation is therefore twelve years from the date of the last payment of interest, and consequently the claim is barred.

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(1) By s. 8 of the Real Property Limitation Act, 1874, "No action or suit . . . . shall be brought to recover any sum of money secured by any mortgage, judgment, or lien or otherwise charged upon or payable out of any land or rent at law or in equity . . . . but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime, &c."

(2) (1867) L. R. 3 Eq. 313.

(3) (1882) 22 Ch. D. 511.

Germaine, K.C., and *G. A. Scott*, for the plaintiff. Having regard to the terms of the will, this property must be treated as converted into personalty from the date of the death of the testatrix, and s. 8 does not apply. *Bowyer* v. *Woodman* (1) is distinguishable. In that case there was a trust to sell; here the will contains a compulsory order or direction to sell: *Morris* v. *Griffiths*. (2) The case comes within 3 & 4 Will. 4, c. 42, s. 3, and the period is twenty years. Assuming it to be a mortgage of realty, then no doubt, if the interest assigned were an interest in possession, the action would be barred; but this is a mortgage of a reversionary interest, and that being so the action on the covenant is not within s. 8. All that *Sutton* v. *Sutton* (3) decides is that where there is an action on a covenant in a mortgage by a person who has open to him at the same time the alternative remedy in rem by foreclosure, then the period of limitation is the same in both cases, and the action on the covenant is equally within s. 8. But in the case of a mortgage of a reversionary interest the right to enforce the security does not arise until the interest falls into possession: *Hugill* v. *Wilkinson* (4); and the principle laid down in *Sutton* v. *Sutton* (3) has no application to such a case, because the remedy on the covenant and the remedy against the security are not contemporaneous, and the action must be regarded as an action upon a specialty within 3 & 4 Will 4, c. 42, s. 3.

Stanger, K.C., in reply. That argument gives no effect to the words in s. 8—" within twelve years next after a present right to receive the same shall have accrued."

[He was stopped.]

WRIGHT J. This is an action by a mortgagee against mortgagors to recover principal and interest due under the covenant in the mortgage deed. The defendants contend that the claim is barred by s. 8 of the Real Property Limitation

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(1) L. R. 3 Eq. 313.

(2) (1884) 26 Ch. D. 601.

(3) 22 Ch. D. 511.

(4) (1888) 38 Ch. D. 480.

1874, as the last payment of interest was made more than twelve years before action. The plaintiff says that this is a mortgage not of land but of personalty, that s. 8 does not apply, and that the period of limitation applicable is twenty years, not twelve. I have no doubt whatever that this fund ought, for the purpose of the mortgage, to be regarded as land. I should have thought so even if the land had already been sold.

Well, then, if the fund ought to be regarded as land, why does not s. 8 apply? It is an action brought to recover "a sum of money charged upon or payable out of land." The period of limitation is therefore twelve years. *Sutton* v. *Sutton* (1), as adopted in *In re Frisby* (2), shews that s. 8 applies to an action by a mortgagee against a mortgagor on his covenant as well as to the other remedies of the mortgagee. It is not open to me to insert in s. 8 the words of restriction or exception which I am asked to do by counsel for the plaintiff. The words of the section are wide enough to apply to this case, and I can see no reason why they should be cut down merely because the mortgaged property is an estate in reversion. Sect. 8 is perfectly distinct and intelligible.

Judgment for defendants.

Solicitors for plaintiff: *Taylor, Stileman & Underwood, for J. W. & G. E. Kirkland, Southwell.*

Solicitors for defendants: *Richard F. & C. L. Smith, for Bescoby & Williams, East Retford.*

(1) 22 Ch. D. 511.

(2) (1889) 43 Ch. D. 106.

J. F. C.

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March 30.

[IN THE COURT OF APPEAL.]

THOMPSON AND ANOTHER *v.* GILL.

Practice—Decreet of Court of Session in Scotland—Certificate registered in High Court—Equitable Execution—Appointment of Receiver—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.

An appointment of a receiver by way of equitable execution may be made upon the certificate of a decreet of the Court of Session in Scotland registered in the High Court under the Judgments Extension Act, 1868.

APPEAL from an order made by Bigham J. at chambers as after mentioned.

A decreet was obtained in August, 1902, in the Court of Session in Scotland by Messrs. Thompson and Wright for payment of a sum of money by one Gill. A certificate of this decreet was registered in the High Court in January in the present year under the Judgments Extension Act, 1868. The decreet being unsatisfied, an application was made at chambers by the judgment creditors for the appointment of a receiver of the judgment debtor's life interest in certain trust estate under his marriage settlement, by way of equitable execution. The judgment debtor was a domiciled Scotsman, but for the time was residing in England. The trustees of the settlement were resident in England. It did not appear to have been disputed on behalf of the judgment debtor that the circumstances were such that, if the judgment in question had been an English judgment, a case for equitable execution would have been made out; but it was contended for the judgment debtor that there was no jurisdiction to apply the relief commonly known as equitable execution in the case of a certificate of a judgment registered under the Judgments Extension Act, 1868. Bigham J. made an order for the appointment of a receiver.

Ernest M. Pollock, for the appellant, the judgment debtor. It was held in *In re Watson* (1) that the effect of s. 1 of the Judgments Extension Act, 1868, which contains substantially the same provisions with regard to judgments obtained in the superior Courts in Ireland as s. 3 contains with regard to judgments obtained in the Court of Session in Scotland, is limited by the words "in so far only as relates to execution under this Act" in s. 4, and, therefore, a judgment debtor summons could not be issued on a certificate of an Irish judgment registered under the Act. That decision was followed in *In re a Bankruptcy Notice* (1), where it was held that a bankruptcy notice could not be founded upon a judgment of the Court of Session in Scotland registered under the Act of 1868. Those cases shew that the effect of the Judgments Extension Act, 1868, is confined to "execution" in the proper legal sense of the term. It was held in *In re Shephard* (2) that what is commonly called "equitable execution" is not "execution" in any proper sense of the term, but equitable relief granted because there is no remedy by execution. To the same effect are the cases of *Harris* v. *Beauchamp Brothers* (3) and *Norburn* v. *Norburn*. (4) Sect. 4 of the Judgments Extension Act, 1868, provides that the Court of Common Pleas at Westminster shall only have and exercise the same control and jurisdiction over a judgment or decreet registered under the Act as it "now" exercises and has over any judgment in its own Court. Of course a Court of Common Law could not, before the Judicature Act, have appointed a receiver by way of equitable execution, and it is submitted that a judgment creditor under a Scottish or Irish judgment registered under the Judgments Extension Act, 1868, could not have obtained the aid of a Court of Equity in enforcing such a judgment, because the relief given by a Court of Equity would not have been execution within the meaning of the Act. It is clear on the authorities that what is called equitable execution is not made an ordinary process of execution by the Judicature Act, and cannot be granted except in cases where the Court of Chancery would have granted it before the Act: *In re Shephard* (2); *Harris* v. *Beauchamp Brothers* (3); *Holmes* v. *Millage*. (5) The cases of *Anglo-Italian Bank* v. *Davies* (6) and *Ex parte Evans* (1) turned upon the construction of 27 & 28 Vict. c. 112, s. 1, and are not authorities with regard to the construction of the Judgments Extension Act, 1868. By Order XLII., sub-s. 3, it is no doubt provided that a judgment for the recovery by, or payment to, any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof; but there is nothing in that rule to shew that the relief given in certain cases by the Court of Chancery, which is commonly called equitable execution, is converted into "execution" in the proper sense of the term by the Judicature Act. Rule 8 of Order XLII. defines the meaning of "execution" for the purposes of the order, and that definition would not include "equitable execution." [He also cited *Smith* v. *Cowell*. (2)]

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(1) [1893] 1 Q. B. 21.

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(1) [1898] 1 Q. B. 383.

(2) (1889) 43 Ch. D. 131.

(3) [1894] 1 Q. B. 801.

(4) [1894] 1 Q. B. 448.

(5) [1893] 1 Q. B. 551.

(6) (1878) 9 Ch. D. 275.

Colam, for the respondents, the judgment creditors, was not called on to argue.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. The question which we have to decide really is as to the effect in this case of the words "in so far only as relates to execution" in s. 4 of the Judgments Extension Act, 1868. It is not denied that the effect of s. 3 of that Act is to put a decreet of the Court of Session in Scotland, a certificate of which is registered under that section, in the same position as an English judgment for the purposes of execution. That section in substance provides that a certificate of such a decreet in one of the forms contained in the schedule to the Act may be registered in the Court of Common Pleas at Westminster, whose jurisdiction has now been transferred by the Judicature Act to the High Court, and that such a certificate shall, when registered, have the same effect as a judgment of the Court in which it is registered. Then by s. 4 of the Act it is provided that the Court of Common Pleas at Westminster shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered

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(1) (1879) 13 Ch. D. 252.

(2) (1880) 6 Q. B. D. 75.

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under the Act, as it now has or exercises over any judgment in its own Court, " but in so far only as relates to execution under this Act." What is sought to be done in this case by the appointment of a receiver is certainly what would be said in popular language to amount to obtaining execution by making the property of the judgment debtor available for satisfaction of the judgment debt. What then are the objections made in this case to the appointment of a receiver for that purpose? The appellant's counsel relied in the first place upon the cases of *In re Watson* (1) and *In re a Bankruptcy Notice.* (2) The effect of the first of those cases is that, in the case of a Scottish or Irish judgment registered under the Judgments Extension Act, 1868, the procedure by way of a judgment debtor summons under the Debtors Act, 1869, is not applicable, because the object of that procedure is not properly speaking execution. It is a proceeding of a punitive character, and has not, like execution by fieri facias or elegit, primarily for its object the realization of the judgment out of the property of the debtor. In the second case it was held that a bankruptcy notice, which is merely a step towards making the debtor a bankrupt, could not be said to be execution for the purpose of enforcing satisfaction of the judgment. It is obviously impossible to speak of bankruptcy proceedings as " execution " in any proper legal sense of the term. It seems to me that there is really nothing in either of those cases to prevent us from giving to the words " in so far only as relates to execution " in s. 4 of the Judgments Extension Act, 1868, a construction wide enough to enable us to give a reasonable effect to the provisions of the Act. It was further contended that the decision in the case of *In re Shephard* (3) prevented us from doing so. There are two reasons why I do not think that the decision in that case has that effect. The case of *In re Shephard* (3) primarily decided only this, namely, that there was nothing in Order XLII., r. 23, which enabled the Court to apply the procedure by way of equitable execution under that rule. On looking at that rule, it is obvious that it is really limited to " execution " in the

(1) [1893] 1 Q. B. 21.

(2) [1898] 1 Q. B. 383.

(3) 43 Ch. D. 131.

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modes mentioned in the earlier rules of the order; and, when one turns to rule 8 of the order, one finds that "in these rules, the term 'writ of execution' shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto"; and that "the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case." Then, when one looks at the preceding rules of the order, they mention the various kinds of execution to which the order applies. It would have been sufficient, as I understand the decision in that case, to say that the appointment of a receiver by way of equitable execution did not come within the rules of Order XLII. But, secondly, apart from any question of the mere forms of procedure, there was a substantial reason for the decision in that case, which is not applicable to the circumstances of the present case. In that case, after a judgment had been obtained, the judgment debtor had died, and the Court, referring to the manner in which what was called equitable execution had to be obtained, pointed out, first, that it was a proceeding which could only be applied in aid of a legal judgment, and, secondly, that it could only be obtained after due notice to all persons interested in the property in respect of which it was asked for. It was argued in *In re Shephard* (1) that the same procedure could be followed with regard to equitable execution as in the case of legal execution, and that, as in the case of legal execution no notice need be given to any one of the intention to issue a fi. fa. or other writ of execution, so the application for equitable execution might be made ex parte. In that case no notice of the application had been given to the personal representatives or heir of the judgment debtor. With regard to that Cotton L.J. said: "Was there any jurisdiction to make an order affecting the estate formerly belonging to Mark Shephard, when in consequence of his death the estate no longer belonged to him, and when no person interested in it was before the Court? Chitty J., though he did not decide the case on this ground, expressed an opinion that there was not. It was urged that there was, for that this was equitable execution and must follow the analogy of legal execution; that legal execution could be issued ex parte after the death of the judgment debtor, and that therefore there was no reason why equitable execution should not. But is this to be considered as equitable execution, and as subject to the same objections only as legal execution, and, assuming that legal execution can be issued against the estate of a dead person without taking any intermediate step, a proposition to which I am not disposed to assent, does it follow that equitable execution can be so issued? In my opinion it does not. Confusion of ideas has arisen from the use of the term 'equitable execution.' The expression tends to error. It has often been used by judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law. Until recently nobody ever thought that an order for a receiver could be obtained in aid of a legal judgment, unless there was a hindrance to obtaining execution at law." Then the Lord Justice went on to point out what the procedure was in a Court of Equity with regard to obtaining equitable execution; but he only did so for the purpose of shewing that, having regard to the nature of the proceeding, it was impossible, after the death of the judgment debtor, to obtain equitable execution without bringing before the Court the persons interested in the estate which formerly belonged to the judgment debtor. It appears to me that there is nothing in the case of *In re Shephard* (1), when rightly apprehended, to prevent us from giving the wide meaning which I have suggested to the terms of s. 4 of the Judgments Extension Act, 1868. Then it was said that the observations of Davey L.J. in *Harris* v. *Beauchamp Brothers* (2) were inconsistent with the view which I

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(1) 43 Ch. D. 131.

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(1) 43 Ch. D. 131.

(2) [1894] 1 Q. B. 801.

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am now expressing. There again, speaking for myself, I do not find anything in what was said in that case which compels us to give such a narrow meaning to the words of s. 4 as would make them exclude equitable execution. The learned Lord Justice approved of the decision in *In re Shephard* (1), but he only did so for the purpose of shewing that, in dealing with an application for equitable execution, it was necessary not to leave out of consideration on what grounds such execution was obtainable before the Judicature Act, and that it was a proceeding in which notice to the persons interested in the property in respect of which the appointment of a receiver was asked for was essential. That this was the only meaning of his observations appears clear, on referring to the judgment of James L.J. in *Ex parte Evans.* (2) He said in that case: "Beyond all question it was held in *Hatton* v. *Haywood* (3) and *Anglo-Italian Bank* v. *Davies* (4) that an order appointing a receiver amounted to equitable execution. A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a Court of Equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the Court made the order giving the right to the possession of the land to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of elegit at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest." I believe the view so taken by James L.J. to be the right mode of regarding equitable execution, and I do not think that it is really inconsistent with anything that was said in *In re Shephard* (1) or *Harris* v. *Beauchamp Brothers* (5) with regard to the circumstances under which, and the procedure by which, equitable execution can be obtained. It is quite plain, in my opinion, that James L.J. regarded equitable execution as substantially a form of execution; execution which a Court of Equity enables a judgment creditor to obtain where legal execution is not available. I can see no valid reason why we should hold that the words at the end of the 4th section of the Judgments Extension Act, 1868, exclude equitable execution in the case of judgments registered under that Act. I do not think it necessary to deal at any length with the argument as to the effect of the word "now" at the end of the 4th section. I am not satisfied that, after the passing of the Act of 1868, a creditor, whose judgment in Scotland was registered under the Act in England, could not have gone to the Court of Chancery, and obtained equitable execution in the same manner as an English judgment creditor could have done. Having regard to the provisions of s. 6 of the Act, which provides that costs are not to be allowed to any party bringing an action on any judgment or decreet which might be registered under the Act, unless the Court or a judge shall otherwise order, it seems to me clear that the intention of the Act was to place a judgment creditor who had registered his judgment under the Act in the same position as if he had brought an action upon the judgment in England and obtained judgment in that action. For these reasons I think that this appeal should be dismissed.

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(1) 43 Ch. D. 131.

(2) 13 Ch. D. 252.

(3) (1874) L. R. 9 Ch. 229.

(4) 9 Ch. D. 275.

(5) [1894] 1 Q. B. 801.

STIRLING L.J. I am of the same opinion. The appeal in this case is against an order made at chambers appointing a receiver by way of equitable execution upon a judgment originally obtained in Scotland, and registered in the High Court under the Judgments Extension Act, 1868. The facts appear to be such that, if the judgment had been originally obtained in England, the judgment creditor would according to the practice of the Court be entitled to the appointment of a receiver by way of equitable execution. It is argued, however, that, regard being had to the terms of the Act of 1868 as interpreted by the Courts, the judgment creditors in the present case are not so entitled. Sect. 3 of the Act is undoubtedly expressed in the widest terms. It enables a creditor, who has obtained a decreet in the Court of Session in Scotland for payment of money, to obtain a certificate of that decreet, which may be registered in the Court of Common Pleas at Westminster, and which, upon such registration, is to have the same effect as a judgment obtained or entered up in that Court, and all proceedings may be taken thereon as if the decreet had been a judgment originally obtained in the same Court. If that section stood alone, there could be no question in the case; but regard must no doubt be had to the terms of s. 4. It has been truly said that in two cases, namely, *In re Watson* (1) and *In re a Bankruptcy Notice* (2), it has been held by the Court of Appeal that the effect of s. 4 is to limit the effect of the wide terms of s. 3 to proceedings which "relate to execution under the Act." In the first of those cases it was held that a judgment debtor summons, and in the second that a bankruptcy notice, was not such a proceeding. The question in the present case is whether the words "in so far only as relates to execution" in s. 4 are to be so construed as to exclude in such a case as this the obtaining of a receiver by way of equitable execution, and to confine the operation of the Act to legal execution in the strictest sense. Having regard to the way in which the word "execution" has been interpreted in various cases, I do not think that we ought to construe the words of s. 4 so strictly as suggested. The question arose after the passing of the Act 27 & 28 Vict. c. 112, whether the appointment of a receiver in respect of land by way of equitable execution constituted a "delivery in execution by virtue of other lawful authority" within the meaning of s. 1 of that statute. It was held first in *Hatton* v. *Haywood* (3) and afterwards in *Anglo-Italian Bank* v. *Davies* (4) that what is commonly called "equitable execution" amounted to such a delivery in execution. In the case of *Blackman* v. *Fysh* (5) a testator devised freehold estate to his son for life with remainders over, and by a subsequent clause in the will directed that, if the estate devised to his son should be "taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void and cease. It was held that the appointment of a receiver

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(1) [1893] 1 Q. B. 21.

(2) [1898] 1 Q. B. 383.

(3) L. R. 9 Ch. 229.

(4) 9 Ch. D. 275.

(5) [1892] 3 Ch. 209.

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of the rents of the estate by way of equitable execution amounted to a taking in execution within the meaning of the clause, and therefore the event had happened upon which the son's estate determined. Looking at these authorities, I think we ought not to read the word "execution" in s. 4 of the Judgments Extension Act, 1868, so as to exclude the appointment of a receiver by way of equitable execution. I do not think that, in coming to that conclusion, we are deciding anything contrary to the decision in *In re Shephard*. (1) I think that all the Court meant to decide in that case was that what has been called equitable execution, which, they said with perfect accuracy, should properly be called equitable relief, was not governed by the same rules as legal execution in the strict sense of the term. The appellant's counsel has called our attention to the word "now," which occurs in the 4th section, and has argued that, when the Act of 1868 was passed, there could be no equitable execution on a judgment obtained in Scotland, and afterwards registered in England under the Act. If it be necessary to decide that question, I should come to the opposite conclusion. It was admitted that, if an action had been brought on a Scottish judgment in England, and judgment obtained in that action, the judgment creditor might, by independent proceedings in the Court of Chancery, have obtained the appointment of a receiver by way of equitable execution; but it was argued that, without going through that form, in the year 1868 equitable execution could not have been obtained. It was undoubtedly then necessary to take independent proceedings in Chancery for the purpose of obtaining equitable execution; but it seems to me that the intention of the Act was to put the creditor who had obtained a judgment in Scotland, and registered that judgment under the Act in England, in the same position for all purposes as regards execution, including the so-called equitable execution, as if he had obtained a judgment in England. The provisions of s. 6 of the Act appear to me to point very strongly to that conclusion. The intention appears to have been to discourage the bringing of actions on such judgments, and to substitute

(1) 43 Ch. D. 131.

for that mode of proceeding a shorter and more convenient mode of obtaining the same result. In the absence of authority on the subject, I see no ground for saying that the judgment creditor could not on the passing of the Act of 1868 have obtained equitable execution on a judgment registered under the Act in the same way as he could if he had obtained a judgment in England in an action upon his Scottish judgment. With regard to the case of *Norburn* v. *Norburn* (1), I do not in any way dispute its authority, but it wholly depends on the construction of the rules which were there in question, and does not touch the question of the proper construction of the Judgments Extension Act, 1868.

MATHEW L.J. I am of the same opinion. The argument which has been addressed to us on behalf of the appellant is of a very technical character. It was admitted that, if the judgment in this case had been an English judgment, there would have been a right on the part of the judgment creditors, upon application at chambers, to obtain equitable execution by the appointment of a receiver. But it is said that there was no such right in the case of a judgment originally obtained in Scotland, which had been registered under the Act of 1868. That argument appears to me to ignore the terms of s. 3 of the Act, which provides that the certificate of the judgment, when registered, shall "be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered." I cannot see any reason, having regard to the terms of the Act, why, when a judgment obtained in Scotland is registered in the High Court under the Act, the creditor under it should be in a different position from that which he would have occupied if the judgment had been originally obtained in the High Court. It seems to me free from doubt on the language of the statute that such a judgment creditor could before the Judicature Act have gone to the

(1) [1894] 1 Q. B. 448.

Court of Chancery, and obtained its assistance in order to procure satisfaction of his judgment. The object of the Judicature Act was to assimilate the proceedings of the Courts, and to give jurisdiction to the King's Bench Division to administer any relief which formerly might have been given by the Court of Chancery. In my opinion the effect of the Act of 1868 is that a judgment obtained in Ireland or Scotland is, when registered under the Act, to be treated as if it had been originally an English judgment, and, therefore, the appointment of a receiver by way of equitable execution of that judgment may now be made in accordance with the Rules of the Supreme Court by which such an appointment is regulated. Order L., r. 15A, provides that "in every case in which an application is made for the appointment of a receiver by way of equitable execution" the Court or judge, in determining whether it is just or convenient that such an appointment shall be made, shall have regard to certain considerations mentioned in the rule. This rule appears to me to recognise, as a mode of execution under the Judicature Act applicable in certain cases, the relief which in such cases could before that Act have been obtained in the Court of Chancery. I do not think it necessary further to discuss the argument which has been based upon the word "now" in the 4th section of the Judgments Extension Act, 1868, or the authorities to which we have been referred, for I think that they have been already sufficiently discussed. I do not think that the cases upon which the appellant's counsel relied were really any authority for the position taken by him. The true effect of two of those cases was merely to shew that, under the particular circumstances which existed in them, no case had been made for appointing a receiver by way of equitable execution. It would seem to be assumed that in a proper case a judgment may be enforced under the Judicature Act by equitable execution.

Appeal dismissed.

Solicitors for appellant: *Balfour Allan & North.*
Solicitors for respondents: *Emanuel & Simmonds.*

E. L.

C. A.

1903

March 13.

[IN THE COURT OF APPEAL.]

LAWFORD *v.* THE BILLERICAY RURAL DISTRICT COUNCIL.

Corporation—Contract not under Seal—Executed Consideration—Work done at Request of Corporation—Contract to pay implied from Acceptance of Benefit.

Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied.

Clarke v. *Cuckfield Union*, (1852) 21 L. J. (Q.B.) 349, and *Nicholson* v. *Bradfield Union*, (1866) L. R. 1 Q. B. 620, approved.

Appeal from the judgment of Darling J. at the trial of the action without a jury.

The action was brought to recover from the defendants remuneration for services rendered at their request by the plaintiff as an engineer in preparing a report and plans with regard to a scheme of sewerage contemplated by the defendants, and for other work done in connection therewith.

It appeared that prior to the matters to which the action related the plaintiff had been acting as engineer for the defendants, under an agreement under their common seal, in respect of certain sewerage works carried out by them and known as the Shenfield and Hutton scheme. It having been discovered that the drainage of a portion of the district not included in the original scheme was defective, the consideration of this matter was referred to a committee under s. 56 of the Local Government Act, 1894, and the committee passed a resolution that the plaintiff should be requested to visit Shenfield Common, the place in question, and report as to the work that was necessary and the probable cost. The plaintiff accordingly visited the place, made a survey, and sent a report and estimate to the committee. He was then instructed by the committee to act as engineer in respect of the Shenfield Common extension work. The services that he would have to perform as engineer were to prepare plans, specifications, and other documents, to attend at any local inquiry held by the Local Government Board, to obtain tenders for the work, and to superintend it as it was carried out. A correspondence passed between the clerk to the defendants and the plaintiff with regard to his remuneration, but there was no agreement under seal relating to the employment of the plaintiff. With the exception of the correspondence above referred to, the plaintiff was in communication throughout with the committee, but the various resolutions passed from time to time by the committee with regard to the employment of the plaintiff were submitted to and approved by the defendants. The plaintiff carried out the necessary duties arising from his position as engineer in respect of the Shenfield Common sewerage extension scheme, including attendance at a Local Government Board inquiry, at which the scheme was sanctioned, and the taking out of quantities and the procuring of tenders. None of the tenders were accepted, and, a difference of opinion having arisen as to the amount of remuneration to which the plaintiff was entitled, the defendants declined to pay the amount which the plaintiff claimed to be due to him upon the terms of the agreement contained in the correspondence. The plaintiff thereupon brought this action, in the course of which it was not disputed that the plaintiff had received instructions to do the work, or that work of the nature of that done by him was essential where sewerage works were in contemplation by a local authority; but it was contended that, there being no agreement under the common seal of the defendants, the plaintiff could not recover in the action. The learned judge took that view, and gave judgment for the defendants.

The plaintiff appealed.

C. A. Russell, K.C., and *Danckwerts, K.C.* (*Montague Lush, K.C.*, with them), for the plaintiff. This case falls within the exceptions to the rule that a corporation can only contract under seal. It is not a question here of an executory contract. The work has been done; and the defendants have had the benefit of it; and the work was in respect of matters incidental to the very purpose for which the district council existed, and which became necessary by reason of the current exigencies of their business. The learned judge in the Court below treated the case as if all the work done by the plaintiff had been done in pursuance of one contract. But that view is not in accordance with the facts. Each of the successive orders given from time to time to the plaintiff in respect of the different items of the claim arose out of the previous step taken, and it would be absurd that in each case during the transaction of business of this kind a seal should be required. Take, for instance, the order given by telegram to the plaintiff to attend as a witness on the inquiry before the inspector of the Local Government Board. It is not reasonable to suppose that such an order could only be given under seal. The case falls within the principle laid down in *Clarke* v. *Cuckfield Union* (1), *Haigh* v. *North Bierley Union* (2), and *Nicholson* v. *Bradfield Union*. (3)

Each of the orders given to the plaintiff was given by the committee of the council, to whom sewerage matters were delegated, and was subsequently approved by the council. Under the Local Government Act, 1894, s. 56, sub-s. 1, a district council has power to appoint committees which may consist wholly or in part of members of the council. It is submitted that the general principle which may be deduced from the cases on this subject is that, where acts have been done by persons duly authorized by a corporation in that behalf, from which the law will imply a contract, no contract under seal is necessary to bind the corporation. Where a plaintiff is driven to rely on an express contract, a seal is necessary; but not in a case where the law will infer a contract. Here the committee, who were duly authorized in that behalf, and whose acts were subsequently approved by the council, ordered

(1) 21 L. J. (Q.B.) 349.

(2) (1858) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(3) L. R. 1 Q. B. 620.

the work to be done: the work was done; and the council took the benefit of it. Under such circumstances the law implies a contract to pay for it, and there is no need of an express contract or a seal. The decisions with regard to urban sanitary authorities, such as *Hunt* v. *Wimbledon Local Board* (1), have no application, for the Public Health Act, 1875, s. 174, expressly requires every contract made by an urban authority, the amount of which exceeds 50*l.*, to be made under seal. There is no such provision as to rural district councils.

[They also cited *Church* v. *Imperial Gas Light and Coke Co.* (2); *Ludlow Corporation* v. *Charlton* (3); *Arnold* v. *Poole Corporation* (4); *Fishmongers' Co.* v. *Robertson* (5); *Hall* v. *Swansea Corporation* (6); *Paine* v. *Strand Union* (7); *Sanders* v. *St. Neot's Union* (8); *Lamprell* v. *Billericay Union* (9); *Lowe* v. *London and North Western Railway* (10); *Smart* v. *West Ham Union* (11); *London Dock Co.* v. *Sinnott* (12); *Kidderminster Corporation* v. *Hardwick* (13); *Young* v. *Leamington Spa Corporation.* (14)]

Macmorran, K.C., and *Naldrett*, for the defendants. None of the orders for the doing of work by the plaintiff can be regarded as given by the committee. No act of the committee has any validity unless and until the approval of the council has been obtained: see Local Government Act, 1894, s. 56, sub-s. 1. That sub-section expressly states that the committee have no power to make a contract. The contract, therefore, was by the council. It is contained in two letters which as between private parties would constitute a binding contract, but as between the parties to this action required for its validity the seal of the corporate body.

Taking the cases bearing on this matter in order of time,

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(1) (1878) 4 C. P. D. 48.
(2) (1838) 6 A. & E. 846; 45 R. R. 638.
(3) (1840) 6 M. & W. 815; 55 R. R. 794.
(4) (1842) 4 Man. & G. 860.
(5) (1843) 5 Man. & G. 131.
(6) (1844) 5 Q. B. 526.
(7) (1846) 8 Q. B. 326.
(8) (1846) 8 Q. B. 810.
(9) (1849) 3 Ex. 283.
(10) (1852) 18 Q. B. 632.
(11) (1855) 10 Ex. 867.
(12) (1857) 8 E. & B. 347.
(13) (1873) L. R. 9 Ex. 13.
(14) (1883) 8 App. Cas. 517.

Church v. *Imperial Gas Light and Coke Co.* (1) shews that the only exceptions to the general rule that a contract by a corporate body requires a seal arise where to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, and the examples given are matters either insignificant or of frequent occurrence. In *Ludlow Corporation* v. *Charlton* (2) the Court of Exchequer expressed agreement with that view. Rolfe B., in giving the judgment of the Court, pointed out that the rule was not a technical one, but that it arose from necessity inherent in the very nature of a corporation. In *Arnold* v. *Poole Corporation* (3) these cases were followed by the Court of Common Pleas in a considered judgment delivered by Tindal C.J. *Hall* v. *Swansea Corporation* (4) does not govern the present case, which is an action on an express contract to do certain work, and not an action to recover money received and improperly withheld by the defendants. In *Paine* v. *Strand Union* (5) the matter in dispute was not unlike that in the present case, for it arose on a claim for payment for work done in making a survey and plans and attending as a witness, and the contract not being under seal the plaintiff could not recover. *Sanders* v. *St. Neot's Union* (6) was a case in which goods were supplied to and accepted for purposes connected with the corporation, and came within the exceptions previously recognised.

[VAUGHAN WILLIAMS L.J. May there not be an exception in cases where the law implies a promise to pay, as in *Doe* d. *Pennington* v. *Taniere* (7) referred to in Williams' Notes to Saunders, vol. i. p. 617 ?]

That may be true as a general principle, but it does not apply to a contract evidenced by writing to do certain works, and the effect of the want of a seal cannot be got rid of by saying that each item falls within one of the recognised exceptions. The question is not what is the value of the work, but how much the defendants contracted to pay. *Lamprell* v. *Billericay Union* (1) was a case of a building contract under seal, and an action to recover for extras which the defendants had accepted; but it was held that the plaintiff was not entitled on a quantum meruit, as the corporation could only contract under seal. *Clarke* v. *Cuckfield Union* (2) is the strongest case in favour of the plaintiff; but Wightman J., who decided that case, differed from the considered judgment of the Court of Exchequer in the last-mentioned case. That Court, however, adhered in *Smart* v. *West Ham Union* (3) to the view they had previously expressed. In *Haigh* v. *North Bierley Union* (4) Erle J. and Crompton J. followed the decision of Wightman J., but the latter judge did so with some doubt. That decision was also approved in *Nicholson* v. *Bradfield Union.* (5) *Dyte* v. *St. Pancras Guardians* (6) was the case of a breach of contract to employ a medical officer, which was held not to come within any of the exceptions. Yet the employment of a medical man is certainly one of the duties of guardians. *Austin* v. *Bethnal Green Guardians* (7) was the case of the employment of a clerk to the guardians, to which the same remark applies. The actual decision in *Young* v. *Leamington Spa Corporation* (8) does not apply because of the statutory enactment as to the value or amount of the contract involved, which, as pointed out by Lord Blackburn, was intended to provide against the difficulties that arose from the conflicting decisions. Most of the cases are mentioned in his judgment, but no opinion is expressed as to the weight of authority on either side. In *Stevens* v. *Hounslow Burial Board* (9) there was a sealed contract, but the action was brought for extras. The Court were divided in opinion, Fry L.J. holding that the board were not liable, and Mathew J. being of the contrary opinion.

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(1) 6 A. & E. 846; 45 R. R. 638.
(2) 6 M. & W. 815; 55 R. R. 794.
(3) 4 Man. & G. 860.
(4) 5 Q. B. 526.
(5) 8 Q. B. 326.
(6) 8 Q. B. 810.
(7) (1848) 12 Q. B. 998.

The conclusion from a review of the cases is that, where the contract is one that requires a seal, it makes no difference in

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(1) 3 Ex. 283.

(2) 21 L. J. (Q.B.) 349.

(3) 10 Ex. 867.

(4) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(5) L. R. 1 Q. B. 620.

(6) (1872) 27 L. T. 342.

(7) (1874) L. R. 9 C. P. 91.

(8) 8 App. Cas. 517.

(9) (1890) 61 L. T. 839.

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the right to recover under it whether the contract has been executed or not, and, further, that it is not sufficient to shew that the work was incidental to the purpose for which the corporation was created. The mere combination of the two facts, that the work has been done and that it is incidental to the purposes of the corporation, does not give a right of action. To give the plaintiff in such a case a right to recover there must have been, in the giving of the order, a question of convenience amounting to necessity, as in matters either of everyday occurrence or of a trivial nature. The position taken by the defendants is that an appointment of an engineer to carry out certain works, and to be remunerated on certain terms, is a contract that can only be enforced if it is under seal.

Montague Lush, K.C., in reply. It is true that the committee cannot make a contract; but when they have initiated one it becomes operative when confirmed and adopted by the council, just as the approval of a vestry of the act of a committee appointed under the Metropolis Management Act, 1855, gives validity to acts of the committee done before the approval is given: *Firth* v. *Staines*. (1) If the term "contract" includes getting assistance for the purpose of carrying out the matter delegated to the committee, the delegation is futile, for the moment they take any step it would be said that they were exceeding their powers. It is sufficient that their acts should be adopted by the council.

On principle the rule of the common law as to the necessity for a seal in the case of a corporation applies only to the making of a contract, and is inapplicable to the case of services rendered by request, the benefit of which is accepted.

VAUGHAN WILLIAMS L.J. This is an action in which the plaintiff makes a claim against the defendants for money due from them under an agreement, and for services rendered at their request. That is the indorsement on the writ, and the statement of claim claims for the plaintiff, amongst other things, on a quantum meruit for services rendered at the request of the defendants.

(1) [1897] 2 Q. B. 70.

The defence, so far as we have to deal with it, is the absence of a seal from the agreement, and we have to consider whether that is a sufficient answer to the claim. The case was tried before Darling J., who came to the conclusion that the want of a seal constituted a defence to the action. The learned judge was in a less advantageous position than we are in this Court, because this is in a case in which there are many authorities generally in the Courts of first instance, and not in the Exchequer Chamber or the Court of Appeal, and he had not power to overrule any of those decisions, and had as best he might to reconcile them and arrive at a conclusion in this case. We have, however, the power to overrule these cases so far as we do not approve of them, except, of course, any case in the House of Lords. As to this, the only case in the House of Lords (1) cited to us is not a direct authority on the matter, for Lord Blackburn in his judgment distinctly leaves open the question raised in this case, and approved the suggestion of Lindley L.J. that it was desirable that the matter should be dealt with in a Court of Appeal. The choice before us in this case is whether we should follow the decision in *Clarke* v. *Cuckfield Union* (2), or other decisions that are inconsistent with it. In *Nicholson* v. *Bradfield Union* (3) the cases are dealt with at considerable length, and at p. 622 of the report the authorities on one side and the other are marshalled.

Before I add anything further about the authorities, I wish to say a few words as to the statute which governs this matter, and to express my view of the legal position having regard to the statute. The Local Government Act, 1894, so far as I understand, with regard to the powers to delegate authority to a committee, diminishes rather than increases the powers given by the Public Health Act, 1875. Sect. 56, sub-s. 1, of the Act of 1894 enacts that a parish or district council may appoint committees for the exercise of any powers which, in the opinion of the council, can be properly exercised by committees, and the acts of every such committee are to be submitted to the council for approval. Then follows a proviso that where a

(1) *Young* v. *Leamington Spa Corporation*, 8 App. Cas. 517.

(2) 21 L. J. (Q.B.) 349.

(3) L. R. 1 Q. B. 620.

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committee is appointed the council may authorize the committee to institute any proceeding, or do any act, which the council might have instituted or done for that purpose "other than the raising of any loan or the making of any rate or contract." According to the view that I take of this case, that section did not authorize the defendants to empower the committee to enter into the suggested contract with the plaintiff. Further, it seems to me that not only had the committee no power to make the contract, but that, in fact, the committee did not purport to make any contract on behalf of the defendants. On both these grounds we must deal with the matter as being a contract entered into by the council and not by the committee. As I understood the argument put forward on behalf of the plaintiff it came to this—that though it might be an answer to an action on a contract by the council that there was no seal, that was not the present case, in which we had to deal with a contract made by the committee and confirmed by the council. For the reasons that I have given that argument cannot succeed; and we must deal with the case on the basis that we have to decide whether or no the defendants have so contracted, or so acted, as to be liable in this action.

Turning to the cases, I find that Blackburn J. at the conclusion of his judgment in *Nicholson* v. *Bradfield Union* (1) said: "The case of *Clarke* v. *Cuckfield Union* (2) is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that, as far as it extends to such a case as the present at least, the case was rightly decided; there may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* (2) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union* (2), we prefer to follow

(1) L. R. 1 Q. B. 620, at p. 627.

(2) 21 L. J. (Q.B.) 349.

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the authority of *Clarke* v. *Cuckfield Union* (1), which we think founded on justice and convenience." In that view of Blackburn J. I agree. I think the decision in *Clarke* v. *Cuckfield Union* (1), and the other cases that have been cited decided on the same lines, are to be preferred to the contrary decisions. I may mention before I leave the case of *Nicholson* v. *Bradfield Union* (2) that it arose on the supply of coals, from time to time, to the guardians of the Bradfield Union, and was a case as to which it would be difficult to say that the matter was so trivial, or of so frequent occurrence, that there was any necessity for giving the order, or contracting for the supply, without waiting to put a seal on the contract. The ground of the decision, as I understand it, was that the coals were accepted and used, and that the law raised an implied contract by the corporate body to pay for them, and that contract being implied from their acts the defence that there was no contract under seal failed. I do not understand that the case was decided upon the recognised exception arising from necessity. The view taken in that case was that of Wightman J. in *Clarke* v. *Cuckfield Union* (1), expressed at p. 354 of the report, where the learned judge, after pointing out the conflict of opinion that existed in the various decisions, said: "I greatly regret the present state of the law upon a subject so important. It would, perhaps, have been better, and have avoided the uncertainty which how exists, if the old rule had never been relaxed; but being as it is, the question is whether the demand in question comes within any of the recognised exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability." It seems to me that is a recognition of the contract arising on the receipt of the benefit of acts done at the request of the corporate body. Another authority which directly recognised this exception is *Haigh* v. *North Bierley Union* (1), in which Erle J. in delivering his judgment refers to *Sanders* v. *St. Neot's Union* (2) and *Clarke* v. *Cuckfield Union* (3), and cites the passage that I have just read from the last-mentioned case. It is right that I should call attention in passing to the judgment of Crompton J., who apparently took the view that if the whole of the work is done under an antecedent contract a seal might be necessary. That does not apply in the present case, where there was no single antecedent order, but a series of orders, for it is clear that work was done to a large extent in surveying and preparing plans before the resolution of the committee in relation to these matters was confirmed by the defendants.

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(1) 21 L. J. (Q.B.) 349.

(2) L. R. 1 Q. B. 620.

Having expressed my view, that I prefer the series of decisions which are in accordance with that of *Clarke* v. *Cuckfield Union* (3), I do not consider it necessary to say more as to the authorities except *Young* v. *Leamington Spa Corporation.* (4) In that case the matter was to a certain extent dealt with by Lord Blackburn in delivering his opinion. It seems to me, though it is not said in so many words, that Lord Blackburn preferred the view taken in *Clarke* v. *Cuckfield Union* (3) and the cases that followed that decision to the view put forward in the adverse series of cases, and adhered to his judgment in *Nicholson* v. *Bradfield Union.* (5) At all events, it can be said that the passage from *Nicholson* v. *Bradfield Union* (5) had been cited to the House of Lords, and nothing can be found in the opinions of their Lordships to cast doubt on the decision in that case.

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(1) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(2) 8 Q. B. 810.

(3) 21 L. J. (Q.B.) 349.

(4) 8 App. Cas. 517.

(5) L. R. 1 Q. B. 620.

I want to say before I conclude that a contract to pay has been implied, after consideration executed and benefit accepted, in a variety of cases in which there has been no contract under seal. Cases have arisen and been decided with regard to money had and received and goods sold and delivered, as in *De Grave* v. *Monmouth Corporation*. (1) That was a nisi prius decision, but it is referred to in the judgments in subsequent cases as an authority. There are also the cases of an action of indebitatus assumpsit, which frequently arose, and also of actions for use and occupation, and cases in which the tenant was suing the corporation on the basis of his position as tenant. The way in which the argument in this and previous cases has tried to get out of these authorities was to explain them on the basis that they related either to trivial matters of daily recurrence or to matters of urgent necessity, so that the absence of a seal might be justified on the ground of the recognised exceptions to the general rule. But, as was pointed out in answer to this argument, if it is sought to limit the exceptions of cases of executed consideration in that way no effect is given to exceptions in the cases to which I have referred. I do not think it is necessary to go at greater length into the matter, but I should like to point out that the exception based on executed consideration is not of recent origin, because it was recognised by Lord Denman in *Doe* d. *Pennington* v. *Taniere* (2), where he says: "Where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. That is by no means inconsistent with the rule that, in general, a corporation can only contract by deed: it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case." Although expressed in a different way, I take it that Lord Denman in effect says that reliance may be placed on an implied contract arising from an executed consideration and acceptance of the benefit of the contract.

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(1) (1830) 4 C. & P. 111.

(2) 12 Q. B. 998, at p. 1013.

Under the circumstances of this case, I think our proper course is to give judgment in favour of the plaintiff, and my judgment to that effect is entirely based on the principles which I understand to have been laid down in *Clarke* v. *Cuckfield Union* (1) and *Haigh* v. *North Bierley Union.* (2)

STIRLING L.J. I am of the same opinion. The case of *Clarke* v. *Cuckfield Union* (1) was decided in 1852 by Wightman J., and the learned judge stated the law in the passage that has been read by my Lord. In 1855 that case was considered by the Court of Exchequer in *Smart* v. *West Ham Union* (3), when two judges of high authority expressed their dissent from it. But in two subsequent cases, also before judges of high authority, the decision in *Clarke* v. *Cuckfield Union* (1) was followed. In *Haigh* v. *North Bierley Union* (2), by a Court consisting of Erle J. and Crompton J., the latter of whom assented with some doubt, and in *Nicholson* v. *Bradfield Union* (4), by a Court consisting of Blackburn J. and Lush J., the principle laid down by Wightman J. was approved. In 1883 Lord Blackburn, as he then was, in *Young* v. *Leamington Spa Corporation* (5) reviewed the authorities, and, as it appears to me, adhered to the judgment that he had given on the point when a judge of the Queen's Bench. In that state of things it appears to me that the weight of authority is in favour of the decision in *Clarke* v. *Cuckfield Union* (1), but I also think that it should be supported on principle for the reasons given by my Lord.

It only remains, therefore, to see whether the present case falls within that decision. In *Clarke* v. *Cuckfield Union* (1) Wightman J. stated the conditions which must be satisfied before the difficulty arising from the want of a seal can be got over. The first question to be considered is whether the work in respect of which the plaintiff seeks to recover is work necessary for the defendant corporation in carrying out the purposes for which it was created. Here we have a rural district council which has, under the Public Health Acts, a duty to provide sewers where they are required, and power for that purpose to enter into contracts. The carrying out of such work is one of the purposes for which the council exists, and in order to enable the council to decide how and when the work should be carried out it was necessary that they should obtain professional advice. They accordingly applied, through the committee to which they had delegated the matter, to the plaintiff, and obtained from him the assistance that they required. The next consideration is whether the orders were given by a board regularly constituted and having general authority to make contracts in respect of such matters, and whether the work done was accepted. I think that, for the reasons given by my Lord, the committee had no power to make a contract with the plaintiff; but the matter was brought before the council and considered, and the minutes of the committee were read and confirmed; and that being so, it seems to me that the confirmation by the council amounted to a ratification of the acts of the committee and an acceptance of the work done by the plaintiff in making his report. The second requirement is therefore satisfied, and the only question that remains is whether the whole consideration for payment was executed, and this clearly is so. I think, therefore, that the defendants are liable to pay for the work done by the plaintiff on a contract to be implied at law from their acts, and that the appeal must be allowed.

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(1) 21 L. J. (Q.B.) 349.

(2) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(3) 10 Ex. 867.

(4) L. R. 1 Q. B. 620.

(5) 8 App. Cas. 517.

MATHEW L.J. I am of the same opinion, and I only desire to add a few words on some points of the argument that has been addressed to us. It is said that in two classes of cases, the one where the work done for a corporation is of a trivial nature, and the other where it relates to matters of frequent occurrence, the general rule that a corporation must contract under seal does not apply. It is argued for the defendants that from this

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point of view there is an end to this claim, because it cannot be held to come within either of those classes. On the other hand, it is said that there is a third exception to the general rule. That exception is that, where work is done or services rendered at the request of the corporation in respect of matters for the doing of which it was created, and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of a private person, a similar implication should be made in the case of a corporation.

Cases have been cited on one side and the other in support of these views. For the defendants a series of cases have been cited, *Ludlow Corporation* v. *Charlton* (1), *Arnold* v. *Poole Corporation* (2), *Lamprell* v. *Billericay Union* (3), and *Smart* v. *West Ham Union* (4), and others, in which the rule as to the necessity for a contract under seal was applied without regard to the acceptance by the corporation of the benefit of the contract.

As against the view of the law on which those decisions were based, another principle was clearly growing up, namely, that upon which the plaintiff relied as a third exception to the general rule. This appears from Lord Ellenborough's decision in the case of *Yarborough* v. *Bank of England* (5), followed by *Hall* v. *Swansea Corporation* (6), an action brought to recover money of the plaintiff received by the corporation and retained by them. Then followed *Sanders* v. *St. Neot's Union* (7), a case in which it cannot be said that the contract related to matters that were either trivial or of constant recurrence. In *Doe* d. *Pennington* v. *Taniere* (8), from the fact of the receipt of rent by a corporation, a contract of demise by them was implied in spite of the contention that they could not make such a contract except under seal. In *Clarke* v. *Cuckfield Union* (9), notwithstanding the previous decisions of

(1) 6 M. & W. 815; 55 R. R. 794.
(2) 4 Man. & G. 860.
(3) 3 Ex. 283.
(4) 10 Ex. 867.
(5) (1812) 16 East, 6; 14 R. R. 272.
(6) 5 Q. B. 526.
(7) 8 Q. B. 810.
(8) 12 Q. B. 998.
(9) 21 L. J. (Q.B.) 349.

the Barons of the Exchequer to the contrary effect, the principle of this third exception to the general rule was clearly enunciated and maintained. It is unnecessary to go into the subsequent cases in which *Clarke* v. *Cuckfield Union* (1) was followed, and I pass to the case of *Young* v. *Leamington Spa Corporation* (2), in which the observations of Lord Blackburn in giving his opinion seem to me to point to his adherence to the previous approval that he had given to the judgment of Wightman J. in *Clarke* v. *Cuckfield Union.* (1)

Upon a review of the cases, it seems to me that on the whole the weight of authority is in favour of holding that the defendant corporate body are liable, and that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Bower, Cotton & Bower.*

Solicitors for defendants: *Indermaur & Brown, for Lewis & Quennell, Brentwood.*

(1) 21 L. J. (Q.B.) 349.

(2) 8 App. Cas. 517.

A. M.

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1903
March 19.

[IN THE COURT OF APPEAL.]

SMITH *v.* KYNNERSLEY AND OTHERS.

Bicycle—Liability to Toll—"Sledge, Drag, or such like Carriage"—39 Geo. 3, c. xxviii. (Local).

By a special Act, passed in 1799, the trustees of a bridge were authorized to demand before any passage should be permitted over the bridge the following (amongst other) tolls: "For every sledge, drag, or such like carriage, the sum of sixpence":—

Held, that the clause did not authorize the charge of sixpence in respect of a bicycle passing over the bridge.

APPEAL from a judgment of Wright J. upon a special case, from which the following facts are taken.

In pursuance of an Act, 39 Geo. 3, c. xxviii. (Local), for building a bridge over the river Severn from or near Cressage, in the county of Salop, to the opposite shore, and for making proper roads and avenues to and from the same, which recited that the ford and ferry at Cressage were often obstructed by floods, and that it would be a convenience if a bridge were made, the trustees named in the Act erected the bridge now known as Cressage Bridge, and constructed an approach road at each end thereto.

By s. 11 of the Act it was enacted that, in consideration of the charges that the trustees would be obliged to defray in erecting the bridge and making roads, and repairing and supporting the same, and in doing other necessary matters and things, the bridge when built should be vested in the trustees, and that it should be lawful for them "from time to time and at all times thereafter to ask, demand, receive, recover, and take to and for their own proper use, behoof, and benefit, at any turnpike or toll-house to be erected by virtue of this Act, before any passage shall be permitted through or over the same, the several sums following, that is to say—

"For every coach, chariot, landau, berlin, hearse, chaise, calash, chair, or other such like carriage, drawn by six horses, mares, geldings, or mules, the sum of two shillings, and drawn by four horses, mares, geldings, or mules, the sum of one shilling and sixpence, and drawn by two horses, mares, geldings, or mules, the sum of one shilling, and drawn by one horse, mare, gelding, or mule, the sum of sixpence.

"For every horse, mare, gelding, mule, or ass, and for every pair or yoke of oxen or horned cattle drawing or harnessed or yoked and intended to draw in any waggon, wain, cart, or other such like carriage, the sum of threepence.

"For every horse, mare, gelding, mule, or ass laden or unladen and not drawing, the sum of one penny halfpenny.

"For every horse, mare, gelding, mule, or ass carrying double, the sum of twopence.

"For every drove of oxen, cows, or neat cattle, the sum of tenpence per score, and so in proportion for any less number.

"For every drove of calves, hogs, sheep, or lambs, the sum of fivepence per score, and so in proportion for any less number.

"For every sledge, drag, or such like carriage, the sum of sixpence.

"And for every foot-passenger, one penny.

"Which said several respective sum and sums of money shall be demanded and taken in the name of or as a toll or duty."

By s. 18 the right and property of the ferry and the bridge when built were severally vested in the trustees, and by s. 29 it was enacted that when and as often as it should happen that the bridge might receive such damage from unforeseen accidents that the passage thereof might for some time become dangerous and impracticable, it should be lawful for the trustees, or such person or persons as they should from time to time appoint for that purpose, to provide a proper and convenient ferry or ferries across the river Severn, and as near to the site of the bridge as conveniently might be, and to take for passage over the river by such ferry or ferries such tolls as were by the Act authorized to be taken for passing over the bridge.

By s. 33 it was enacted that the bridge should not be rated or assessed to the payment of any public or parochial rate or tax whatsoever at a higher rate than the ferry stood rated for the year 1796, nor should the bridge be deemed a county bridge.

The plaintiff was a member of the Cyclists' Touring Club, and the defendants were the trustees for the time being of the bridge under the Act, and entitled to demand and take the aforesaid tolls.

The plaintiff desiring to pass over the bridge riding on a bicycle presented himself for that purpose, and tendered to the defendants' servant, the keeper of the toll-gate across the approach to the bridge, the sum of one penny. The keeper refused to allow the plaintiff to pass over the bridge with the bicycle or riding on the same without payment of the sum of sixpence as a toll, and the plaintiff paid that sum to the keeper, the extra sum of fivepence being paid under protest in order that the plaintiff might obtain passage over the bridge with or riding on his bicycle.

The question for the opinion of the Court was—what toll the defendants were entitled to charge the plaintiff by virtue of the Act for permitting him to pass over the bridge with or riding on a bicycle.

The learned judge gave judgment for the plaintiff.

The defendants appealed.

Danckwerts, K.C., and *R. Cunningham Glen*, for the defendants. The bridge is vested in the trustees and is not a public highway. The bridge is rateable, and therefore the trustees must be in occupation of it, for the mere right to take tolls is not rateable: *Rex* v. *Eyre* (1); *Hare* v. *Putney Overseers.* (2) It follows that the only right of the public to use the bridge arises under s. 11, and only upon payment of tolls. Consequently, unless the plaintiff is within one of the clauses of s. 11, he could only use the bridge by arrangement with the trustees. As to the classes of vehicles in respect of which the toll can be demanded, the first category relates to vehicles drawn by animals, the second to animals, and the clause as to sledge, drag, or such like carriage to carriages of any sort not drawn by animals. A sledge is something without wheels, but still a carriage for the transit of goods and propelled by hand. A drag is a kind of carriage with wheels, and is defined in Johnson's Dictionary as "a kind of car drawn by hand," and as

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(1) (1810) 12 East, 416.

(2) (1881) 7 Q. B. D. 223.

"like a low car," and in Webster's Dictionary as "a low car." It follows that the expression "such like carriage" will apply to a bicycle, which is a wheeled carriage propelled by the rider. This view is confirmed by *Taylor* v. *Goodwin* (1), which shews that a bicycle is a sort of carriage.

[They also cited *Plymouth Tramways Co.* v. *General Tolls Co.* (2); *Cannan* v. *Earl Abingdon* (3); *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (4)]

Macmorran, K.C., and *Ebblewhite* (*Chester Jones* with them), for the plaintiff. The words "sledge, drag, or such like carriage" are descriptive of carriages without wheels. A sledge has runners and not wheels, and a drag is defined in Murray's Dictionary as "an overland conveyance without wheels; a rough kind of sledge." It was used in the drawing of timber. A bicycle is not comparable to a sledge or drag. It has wheels and is not drawn or dragged, but propelled by muscular power. In *Williams* v. *Ellis* (5) it was held that a bicycle was not a carriage within a local turnpike Act that imposed a toll on carriages drawn or impelled or set or kept in motion otherwise than by being drawn by beasts of draught. In *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (6) the Lord Chancellor laid down as a rule of construction that it should be ascertained whether there is anything which corresponds in the ordinary and natural course of meaning to the language which the Legislature used in making the things mentioned the subject of taxation. On that rule of construction a bicycle cannot be charged with toll.

Danckwerts, K.C., in reply.

VAUGHAN WILLIAMS L.J. I do not think that we ought to differ from the conclusion arrived at by my brother Wright. To my mind the only question that we have to decide is whether or not a bicycle comes within the last category but one in the schedule to the local Act. The words are: "For every sledge, drag, or such like carriage, the sum of sixpence." I am not sure that the canon of construction laid down by the Lord

(1) (1879) 4 Q. B. D. 228.
(2) (1898) 14 Times L. R. 531.
(3) [1900] 2 Q. B. 66.
(4) Ante, p. 405.
(5) (1880) 5 Q. B. D. 175.
(6) Ante, at p. 411.

Chancellor in the House of Lords in *Plymouth Tramways Co.* v. *General Tolls Co.* (1) is quite identical with that which he laid down in the Court of Appeal in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (2); but I think I am bound to assume that there is nothing inconsistent in them. Attention was called during the argument to the fact that the Act in the latter case had not the same sort of provisions that had to be dealt with in the former case. The latter case was more like that before us than the *Plymouth Case.* (1) At the same time, I do not think that the distinction between those cases is such as to cause us to apply any different rule to the case before us from that laid down in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (3) in a passage in which it was said: "The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed?" Here we have to consider what in ordinary intendment would be considered to be a "sledge, drag, or such like carriage" when this Act was passed. I do not think that we ought to leave out of consideration the fact that the schedule of tolls is drawn in the form of dividing the vehicles mentioned into various categories. Looking at the schedule, I find that carriages are dealt with in the first clause and in the last clause but one, and I look to see what are the characteristics of the carriages mentioned in those clauses. It is obvious that the first clause refers to carriages that are drawn by horses or other animals, and to my mind the same thing applies to the last clause but one. I am not sure whether it was intended to make a distinction between carriages on wheels in the one case, and carriages without wheels in the other; but, however that may be, in my opinion the characteristic of being drawn by horses or other animals is common to both the descriptive clauses. Taking that view of the statute, I do not think that a bicycle comes within the words "sledge, drag, or other such like carriage," and I therefore have come to the conclusion that the appeal should be dismissed.

(1) 14 Times L. R. 531.

(2) Ante, p. 405.

(3) Ante, at p. 413.

STIRLING L.J. I am of the same opinion. The question is whether a bicycle is chargeable with toll under a clause which makes a "sledge, drag, or other such like carriage" liable to a toll of sixpence. It seems to me that the carriage there referred to must be something similar in kind to the sledge or the drag which are mentioned in the same connection. The question, therefore, is whether a bicycle can be said to be similar in kind to a sledge or drag. In deciding that I apply the principle laid down by the Lord Chancellor in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (1), and ask myself whether in any ordinary sense a bicycle can be "such like carriage" as a sledge or drag; and to that it seems to me there can be but one answer—that it cannot.

The appeal, therefore, in my opinion fails.

MATHEW L.J. In arriving at a conclusion in this case we cannot discard the ordinary rules of construction. The clause on which the defendants rely as being applicable to a bicycle is one that authorizes a toll in respect of a "sledge, drag, or such like carriage." I do not think that clause could reasonably convey to the mind of any one that it was the intention of the Legislature to include such an instrument as a bicycle within it. The toll which seems to be applicable to this case is that provided by the last clause of the schedule of tolls, namely, that which relates to a foot-passenger. A bicycle is intended to afford facilities to a foot-passenger by supplying mechanical power. If that consideration is not considered conclusive, it is quite clear that the carriage for which a toll of sixpence may be demanded is something of the same nature as a sledge or drag, and a bicycle does not fall within that description. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Leslie, Williams & Alder.*
Solicitors for defendants: *Gustavus Thompson & Son.*

A. M.

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(1) Ante, p. 405.

1903
March 23.

In re NEPEAN.
Ex parte RAMCHUND.

Bankruptcy—Receiving Order — Scheme of Arrangement — Provable Debt carrying Interest above 5 *per cent.—Dividend—Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 3, *sub-s.* 9; *s.* 23.

It is competent for a debtor in carrying in a scheme of arrangement under s. 3 of the Bankruptcy Act, 1890, with the consent of his creditors and the approval of the Court, to exclude the application of s. 23 of the Act.

THIS was an application that raised the question whether s. 23 of the Bankruptcy Act, 1890, could be excluded from a scheme of arrangement, under these circumstances.

On July 16, 1902, a receiving order was made against the debtor on a creditor's petition.

In August the debtor lodged a scheme of arrangement under s. 3 of the Bankruptcy Act, 1890, by which, as subsequently amended, a sum of 1800*l*. was provided by the debtor's friends for payment of his debts. The scheme, after providing for payment of preferential debts, and of all costs, charges, and expenses, continued (clause 3): "A dividend shall be paid to each of the creditors on the amount of the debts of each of such creditors provable against the estate of the debtor, and the amount of such dividend shall be as large as the sum provided shall admit of."

This scheme was accepted by the creditors and approved by the Court, and the receiving order was discharged. Several of the creditors, including the petitioning creditor, were Indian money-lenders whose debts carried interest at a rate much exceeding 5 per cent. per annum. Their proofs had been lodged under powers of attorney and had been admitted.

The 1800*l*. was more than sufficient to pay 7*s*. 6*d*. in the pound with interest at 5 per cent. on all the provable debts, and the official receiver in calculating the dividend applied s. 23 of the Bankruptcy Act, 1890, which enacts: "Where a debt has been proved upon a debtor's estate under the principal

Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The Indian creditors objected that s. 23 did not apply to the scheme, and that they were entitled to receive the 7*s.* 6*d.* in the pound on the amounts proved by them against the estate of the debtor in respect of both principal and interest, and now moved the Court for a declaration to that effect.

E. Clayton, for the motion. This is not a scheme under a bankruptcy. Under clause 3 of the scheme the true amounts provable are the debts with interest at the rates agreed, and the proofs have been admitted: *In re Herbert.* (1) Sect. 23 of the Act of 1890 only applies to a bankruptcy under the Act of 1883. At any rate it is inconsistent with and does not apply to this scheme of arrangement, which distinctly provides that the dividend is to be paid on the provable debts, and the provable debts here include debts carrying a higher rate of interest than 5 per cent.

S. G. Lushington, for the official receiver. The scheme must be construed as applying the bankruptcy law for the time being in force, so far as such law is not inconsistent with the express provisions of the scheme or is not excluded by any rule of law or of construction: *In re Athlumney.* (2) Here Part III. of the Act of 1883, which provides for the proof of debts, is applied by force of s. 3 of the Act of 1890, and that brings in s. 23 of the Act of 1890. There is nothing in the scheme inconsistent with s. 23 or which excludes the operation of that section. The section does not prevent payment of the dividend on the full amount of the debt proved, but merely defers payment of the higher rate of interest. It is for the benefit of some creditors at the expense of others. Here, these creditors assented to the scheme without stipulating that as

(1) (1892) 9 Morr. 253.

(2) [1898] 2 Q. B. 547.

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Ex parte.

between themselves and the others s. 23 should not apply. After the debts with interest at 5 per cent. have been paid, there will be a surplus for distribution amongst these creditors in respect of their higher rates of interest.

E. Clayton, in reply.

WRIGHT J. I think on the whole that I ought to hold that this scheme means what the legal effect of its language imports. When it uses the expression "dividend on the amount provable against the estate," it uses those words in the same sense in which they are used in sub-s. 9 of s. 3 of the Act of 1890. That clearly is debts provable, and not merely debts provable for immediate dividend. That being so, I think the scheme here, if fairly construed, especially if construed according to the facts of the case, means that the whole of the provable debt—that is, the debt including interest, not only up to 5 per cent., but the whole interest in this case—is to be provided for. The remaining question is, supposing the scheme clearly enough indicates that, is it a competent or a void provision? It seems to me clear that it is competent for the parties in framing one of these schemes, with the approval of the creditors and of the Court, to exclude some of the provisions which would have effect in the case of bankruptcy without a scheme; and I do not see any reason why it should not be competent for them to exclude s. 23 of the Act of 1890. I see in the case of *In re Athlumney* (1) that was the view which I then took, and I see no reason to alter that view. I hold it is possible in a scheme to exclude s. 23, and I think, fairly read, this scheme has excluded the section. Therefore the motion must be allowed.

Solicitors: *J. Bartlett; Radcliffe, Cator & Hood.*

H. L. F.

(1) [1898] 2 Q. B. 547.

[IN THE COURT OF APPEAL.]

C. A.
1903
March 12, 31.

LONDON COUNTY COUNCIL, APPELLANTS *v.* WANDSWORTH BOROUGH COUNCIL, RESPONDENTS.

Metropolis Management Acts — Street—Paving Expenses—" Owner"— Rack Rent — Public Recreation Ground — Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

By virtue of a scheme certified by the Inclosure Commissioners, pursuant to the Metropolitan Commons Act, 1866, and afterwards confirmed by the Metropolitan Commons (Supplemental) Act, 1873, a common was vested in the Metropolitan Board of Works, whose successors are the London County Council, for the purpose of being dedicated to the public as a recreation ground. By the scheme it was provided that the common should be regulated and managed by the Board, and that no house or other buildings should be erected on it, except such lodges or other buildings as might be necessary for the maintenance or management of the common or recreation ground. The county council derived small annual profits from the herbage on the common and from certain buildings erected thereon for purposes subsidiary to its use as a public recreation ground, but the expenses annually incurred by the county council in the management and regulation of the common far exceeded the amount of any profits so received by them. The Wandsworth Borough Council claimed from the London County Council, as owners of the common, a sum of 319*l.* as their proportion of the estimated expenses of paving a new street, on which the common abutted to the extent of 474 feet, under the Metropolis Management Act, 1855, s. 105, and the Metropolis Management Amendment Act, 1862, s. 77:—

Held, that the London County Council were not "owners" of the common within the definition of the word "owner" contained in the Metropolis Management Act, 1855, s. 250, and therefore they were not liable to pay the amount claimed.

Fulham Vestry v. *Minter*, [1901] 1 K. B. 501, overruled.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Darling J., and Channell J.) upon a case stated by a metropolitan police magistrate.

The facts stated in the case were so far as material as follows. Rastell Avenue is a new street in the parish of Streatham within the metropolitan borough of Wandsworth, and is bounded on the eastern side by a row of houses and on the

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LONDON COUNTY COUNCIL v. WANDSWORTH BOROUGH COUNCIL.

western side by Tooting Beck Common for a length of 474 feet. On February 13, 1873, the Inclosure Commissioners for England and Wales, pursuant to the provisions of the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), certified a scheme relating to Tooting Beck Common, and the said scheme was confirmed by the Metropolitan Commons Supplemental Act, 1873 (36 & 37 Vict. c. lxxxvi.). The said scheme recited that the manor of Tooting Beck had been purchased by Beriah Drew and Philip William Flower, with the knowledge and approval of the Metropolitan Board of Works, to the intent that the commons or waste lands belonging to the said manor might be dedicated to the public as a recreation ground under the provisions of the Metropolitan Commons Act, 1866, and that it had been agreed that the said Beriah Drew and Philip William Flower, in pursuance of the object with which they bought the said manor, and to the intent that the same might be dedicated to the public, would transfer their purchase of and all their interest in the said manor, commons, and waste lands to the Metropolitan Board of Works, and the said Board would accept the transfer thereof. The said scheme provided that from and after the completion of the purchase by the Metropolitan Board of Works the commons or waste lands delineated in a plan deposited with the said Inclosure Commissioners should for the purposes of the scheme be regulated and managed by the said Board. The said scheme contained (inter alia) the following provisions: "(3.) The Board may drain, plant, ornament, and improve the common as may be necessary, and, for the purpose of preserving the turf and grass, may inclose by fences for short periods such portions as may require rest to revive the same, and, for further protection of the common, may put up a post and chain defence against the straying of cattle along such portion of it as is marked by a dotted line on the said plan. No house or any other buildings shall be erected on the common, except such lodges or other buildings as may be necessary for the maintenance or management of the said common or recreation ground. The Board may from time to time erect on the common such lodges and other buildings as may be necessary for the maintenance or management of the said common or recreation ground. (4.) The Board shall frame by-laws and regulations for the prevention of nuisances and the preservation of order on the common or recreation ground, and particularly for preventing the deposit of rubbish on, and the illegal taking, cutting, felling, and sale of turf, sods, bog-earth, gravel, sand, loam, clay, gorse, furze, fern, brushwood, trees, and the like, from the common or recreation ground." Tooting Graveney Common is in the parish of Tooting Graveney, but adjoins Tooting Beck Common; and by s. 14 of the Metropolitan Board of Works (Various Powers) Act, 1875, it is enacted as follows: "From and after the passing of this Act Tooting Graveney Common shall be regulated and managed by the Board as a place of recreation for the public, and for that purpose ss. 2 to 6 (both inclusive) and 9 and 10 of the scheme for the establishment of local management with respect to Tooting Beck Common, confirmed by the Metropolitan Commons Supplemental Act, 1873, shall, by virtue of this Act, extend and apply to Tooting Graveney Common." Tooting Beck Common and Tooting Graveney Common were regulated and managed by the Metropolitan Board of Works under the Acts and the scheme hereinbefore mentioned down to the commencement of the operation of the Local Government Act, 1888, since which time they have been regulated and managed by the London County Council as the successors of the said Board. By-laws relating to the said commons have been from time to time made by the said Board and by the London County Council. The total area of the two commons is about 210 acres. There is a lodge on Tooting Graveney Common, in which an inspector lives, who is employed by the London County Council for the management of the common, and the lodge is necessary for that purpose. A deduction is made from his wages in respect of the quarters provided for him in the lodge. The gross rental value of the lodge is about 30*l.* The distance between this lodge and Rastell Avenue is about 1213 yards in a straight line. There is also a temporary wooden shed, or watch-box. On the Tooting Beck Common there are two sheds or boxes for the use of constables employed by the London County Council to keep order, and a refreshment-house, which is let by the London County Council to a refreshment contractor at a rent of 30*l.* a year, out of which the county council have to pay for repairs, which are estimated to cost about 5*l.* a year on the average. The distance of the said refreshment-house from Rastell Avenue is about 913 yards in a straight line. Save as aforesaid there are no buildings on the commons. The county council let the rights of grazing under one entire contract over all the commons under their management and control for the sum of 210*l.*, of which the sum attributable to Tooting Beck and Tooting Graveney Commons is from 20*l.* to 30*l.*, but it has varied from year to year. The county council receive from the owners and occupiers of houses abutting on the said commons small annual payments, amounting in all to 5*l.* 19*s.* 6*d.*, in respect of licences to have a gateway opening on the said commons, the said sums being charged to prevent the licensees from acquiring a right of way on to the commons. The expenses incurred by the county council in the year 1898–1899 in respect of the management and regulation of the two commons amounted to 1190*l.* 19*s.*, while the total receipts from all sources (excluding the aforesaid sum of 5*l.* 19*s.* 6*d.*) were 26*l.* 7*s.* 3*d.*, made up of 18*l.* 15*s.* from the refreshment-house and 7*l.* 12*s.* 3*d.* in respect of grazing rights. In the year 1899–1900 the expenses amounted to 1518*l.* 11*s.* 9*d.*, and the total receipts from all sources to 55*l.* 15*s.* 3*d.*, made up of 24*l.* 9*s.* from the refreshment-house and 31*l.* 6*s.* 3*d.* in respect of grazing rights. The respondents claimed from the appellants, as the owners of Tooting Beck Common, the sum of 319*l.* 19*s.* as the share apportioned in respect of that common of the estimated expenses of paving Rastell Avenue throughout the whole breadth of the carriage-way and footpath thereof under s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Amendment Act, 1862. The appellants contended that they were not the owners of the said common within the meaning of the definition of the word "owner" in s. 250 of the Metropolis Management Act, 1855; that the said common was not capable of being let at a rack rent in consequence of the provisions of the Metropolitan

Commons Act, 1866, and the Metropolitan Commons Supplemental Act, 1873; and that the appellants did not and could not receive a rack rent for the said common.

The magistrate gave judgment for the respondents for the amount claimed. On the hearing of the special case the Divisional Court affirmed the decision of the magistrate on the authority of *Fulham Vestry* v. *Minter*. (1)

March 12. *Avory, K.C.*, and *Ryde*, for the appellants. It is submitted that the judgment in *Fulham Vestry* v. *Minter* (1) was wrong. Where by statute the use of lands or tenements is so restricted that they cannot yield a rent beyond the necessary expenses of maintenance, there can be no owner within the meaning of s. 250 of the Metropolis Management Act, 1855, because the premises cannot be let at a rack rent: see *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2); *Wright* v. *Ingle*. (3) There is a distinction between cases where the character of incapacity to earn a rent is by statute impressed upon the land itself and cases where the incapacity only attaches to particular persons, who for the time being are owners, by reason of their own contract or the circumstances under which they occupy, as in the case of trustees for charitable or religious purposes. The distinction is well illustrated by the cases of *Angell* v. *Paddington Vestry* (4) and *Wright* v. *Ingle*. (3) In the first of those cases it was held that a church could not be assessed to street improvements because, being consecrated, it was by common law incapable of being let; in the second it was held that the trustees of premises used as a Wesleyan chapel were owners within the meaning of the Metropolis Management Act, 1855, because, by consent of all the parties interested, the trusts might at any moment be put an end to. The principle upon which the case of *Lambeth Overseers* v. *London County Council* (5) was decided is applicable to the present case. The question there was whether Brockwell Park, which, like the land here in question, was by force of statute dedicated to purposes of public recreation, was rateable to poor-rate. It was held that, although the London County Council derived certain annual sums from the park similar in character to those which they derive from the land in the present case, it was not rateable, because, the necessary expenses far exceeding those sums, no hypothetical tenant could be supposed to exist who would be willing to give a rent for the land. In a case where no one could be supposed to be willing to give any rent, a fortiori no one could be supposed to be willing to give a rack rent.

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(1) [1901] 1 K. B. 501.

(2) (1883) 8 App. Cas. 687.

(3) (1885) 16 Q. B. D. 379.

(4) (1868) L. R. 3 Q. B. 714.

(5) [1897] A. C. 625.

[They also cited *Robson* v. *Hyde*. (1)]

Mattinson, K.C., and *J. C. Earle*, for the respondents. The case of *Lambeth Overseers* v. *London County Council* (2) really has no bearing on the present case. It was a poor-rate case, and the ground of the decision was that the London County Council were not in substance occupiers of Brockwell Park, and therefore not rateable. It is obvious that, unless there is occupation of a subject-matter which has a rateable value, there can be no liability to poor-rate. But the question whether there is such an occupation for poor-rate purposes has no connection with the question whether there is ownership for the purposes of s. 77 of the Metropolis Management Amendment Act, 1862, and s. 250 of the Metropolis Management Act, 1855. In *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3) the subject-matter in question was a bridge which the company, as a condition of obtaining their statutory powers, had been obliged to make for the benefit of the public, and which could not really by any possibility be of any benefit to themselves. It was a burden, and could not be looked upon as capable of producing any rent or profit whatever. If land is by law, statutory or common, " struck with perpetual sterility," as it has been termed, then the owners of it may not be owners within the meaning of s. 250 of the Metropolis Management Act, 1855, as in the case of a church: see *Angell* v. *Paddington Vestry* (4); or a highway: see *Plumstead Board of Works* v. *British Land Co.* (5); but it is submitted that, if land is capable of earning any profit, then the owners who would be

(1) (1783) Caldecott, 310.

(2) [1897] A. C. 625.

(3) 8 App. Cas. 687.

(4) L. R. 3 Q. B. 714.

(5) (1874) L. R. 10 Q. B. 203.

entitled to that profit are within the section; and it is immaterial that there may not be any net profit, after the expenses are deducted. In many cases the owners of premises, upon a balance of profit and loss, may derive no net profit from the premises, but that fact can have no bearing upon the question whether they are owners within s. 250. "Rack rent" for the purposes of that section does not necessarily mean the best rent which the land could command, if subject to no restrictions. It may mean the best rent which, having regard to all the circumstances, including any restriction to which the use of the premises may by statute be subject, the premises are capable of earning. In this case the London County Council have power to employ the land for any purpose consistent with the primary statutory object, namely, the maintenance of it as an open space for the recreation and exercise of the public. The case of *St. Giles, Camberwell, Vestry* v. *London Cemetery Co.* (1) shews that it is sufficient to bring the case within the definition of "owner" in s. 250, if part of the land brings in some return; but it is not necessary that there should be an actual letting or that the whole should bring in profit. It is clear from that case that the mere fact that the value of the occupation of the land is diminished by a statutory restriction does not prevent the possibility of a rack rent within the meaning of s. 250. The proposition deduced by Lord Watson from the authorities in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2) is that it is only where land has been placed "extra commercium" or is subject in perpetuity to the burden of a public right, which entirely deprives the owner of its beneficial use, that he is not an owner within the meaning of s. 250.

[They also cited *St. Mary, Islington, Vestry* v. *Cobbett* (3); *Bowditch* v. *Wakefield Local Board* (4); *Hornsey District Council* v. *Smith.* (5)]

Avory, K.C., in reply.

Cur. adv. vult.

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(1) [1894] 1 Q. B. 699.

(2) 8 App. Cas. 687.

(3) [1895] 1 Q. B. 369.

(4) (1871) L. R. 6 Q. B. 567.

(5) [1897] 1 Ch. 843.

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London County Council v. Wandsworth Borough Council.

March 31. Vaughan Williams L.J. read the following judgment:—It was decided in *Lambeth Overseers* v. *London County Council* (1), following *Hare* v. *Overseers of Putney* (2), that the public is not a rateable occupier. The question in this case is whether the public is or can be, within the meaning of the definition of the word "owner" in s. 250 of the Metropolis Management Act, 1855, extended to land by s. 77 of the Act of 1862, owner of land used by virtue of statutory provisions exclusively as a public recreation ground.

Now, in my judgment, this question cannot be disposed of on the authority of the rating cases which I have just cited. From an abstract point of view it is obvious that the question whether property dedicated to the public ought to contribute to poor-rate is a very different question from the question whether such property ought to contribute to a road which is a convenience to the property. Moreover, it seems to me that the present case must necessarily be decided by ascertaining what is the true construction of the interpretation contained in s. 250 of the Act of 1855. The terms of that section are: "'Owner' shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." It seems plain that land may be so dedicated to public purposes that it cannot be let at a rack rent at all, and in such case it seems to me to follow from the decision of the Exchequer Chamber in *Plumstead Board of Works* v. *British Land Co.* (3), that the persons in whom the legal title to such land was vested would not be owners within the meaning of s. 250. The principle is thus stated by Lord Watson in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (4): "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed 'extra commercium,' or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862"; and by Bowen L.J. in *Wright* v. *Ingle* (1) the same principle is thus stated: "Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack rent there ever could be an 'owner' within the meaning of s. 250 I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250."

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(1) [1897] A. C. 625.

(2) (1881) 7 Q. B. D. 223.

(3) L. R. 10 Q. B. 203.

(4) 8 App. Cas. 687, at p. 693.

Applying the principle thus stated to the present case, we have to determine whether the county council could let these commons or any part of them at a rack rent; and in considering this question I do not think that it is of any importance that it is a part only of the land which is so let or could be so let; nor do I think it of any importance that the payment received, or which could be received, is taken in a form in which rack rent is not ordinarily taken, such, for instance, as by way of reduction of wages, or payment for the temporary right to take the herbage, or payment for the right to occupy temporarily a band stand or a refreshment stall. The form is immaterial if that which is taken is the equivalent of rack rent: *St. Giles, Camberwell, Vestry* v. *London Cemetery Co.* (2) Again I do not think that the fact that the statutory conditions under which the land is held prevent so high a rent from being obtained as might have been but for the limitations of user imposed by those conditions negatives the rent received being a rack rent within the meaning of the definition. What we have to determine is whether or not the dedication of the land to public purposes, so that the use of it for any purpose must be a use subordinate to the public purposes to which—to use the words of Lord FitzGerald in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3)—the park or recreation ground is in its whole devoted, excludes those in whom the land is legally vested from the category of owners within the meaning of s. 250 of the Metropolis Management Act, 1855. The fact that the legal owners have no beneficial ownership, but are

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(1) 16 Q. B. D. 379.

(2) [1894] 1 Q. B. 699.

(3) 8 App. Cas. 687, at p. 702.

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merely trustees, does not by the very terms of the section exclude them from the category of owners. Does the fact that they are trustees for the public exclude them? I have come to the conclusion that it does. Apart from some such overriding limitation of the words of s. 250 as is indicated by Lords Watson and Fitzgerald in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1), I should have come to the same conclusion myself as that arrived at in *Fulham Vestry* v. *Minter* (2) by Bruce J. and Phillimore J. and Mr. Rose, the magistrate. In my opinion the London County Council are the owners of land bounding or abutting on the street. They are trustees for the public, and would receive the "rack rent" of the land, as I think it lawfully might be, without interfering with the purposes to which the land is devoted by statute. This in effect is the same conclusion as that arrived at by Mr. Rose in *Fulham Vestry* v. *Minter* (2); but I think that the receipt of such rack rent would be subordinate to the public purposes to which these parks or recreation grounds are wholly devoted. This is not a case where the rents received shew a surplus after providing for the expenses of the execution of the statutory purposes. I think that such dedication to the public places the land "extra commercium," and that the burden of the public right deprives those in whom the legal estate and possession is vested of the beneficial ownership or occupation of such land. In this case the Divisional Court only followed the decision in *Fulham Vestry* v. *Minter* (2), which bound them. It does not bind us, and, as we think it was wrongly decided, we must reverse the decision of the Divisional Court.

STIRLING L.J. read the following judgment:—The question on this special case is whether the London County Council are the owners of Tooting Beck Common within the meaning of s. 250 of the Metropolis Management Act, 1855, so as to be liable to contribute to the cost of a new street on which part of the common abuts. The section referred to provides that the word "owner" in the Act shall (with exceptions unnecessary to be mentioned) "mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

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(1) 8 App. Cas. 687.

(2) [1901] 1 K. B. 501.

The meaning of the definition of owner in s. 250 of the Metropolis Management Act, 1855, and of the similar definition in the Public Health Act, 1875, has been repeatedly considered by the Courts. In *Hornsey District Council* v. *Smith* (1) A. L. Smith L.J., delivering the judgment of the Court of Appeal, after stating in some detail the two cases of *Plumstead Board of Works* v. *British Land Co.* (2), in the Exchequer Chamber, and *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3), says: "These two cases, in our judgment, shew that, if land be by statute for ever incapable of yielding a rack rent, the owner thereof is not 'owner' within the meaning of the Acts." I respectfully agree with this conclusion. The question then reduces itself to this, whether the land is by statute for ever incapable of yielding a rack rent. In *Plumstead Board of Works* v. *British Land Co.* (2) the lands in question were roads dedicated to the public. In *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3) the "lands" consisted of the parapets of a bridge erected over a cutting in which the Great Eastern Railway runs. It was suggested that the walls of the parapets might be turned to profitable use by the company by letting the surfaces for posting advertisements. On this Lord Watson observed: "The suggestion is ingenious, and may or may not have some possible foundation in fact, but it fails to satisfy me that the Legislature in framing the Metropolis Management Acts intended to deal with the surface of a mere roadside fence as 'land' which might be let at a rack rent." With this Lord Blackburn expressed his concurrence. Lord FitzGerald says: "The bridge is by the statute dedicated to public use, and its fence walls are provided for public protection; and if the ownership and control of the walls is in the company, it is so for public purposes and subject to the obligation of perpetual maintenance, unless and until some other good and

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(1) [1897] 1 Ch. 843.

(2) L. R. 10 Q. B. 203.

(3) 8 App. Cas. 687.

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sufficient fences shall be provided by the company in their stead for the public protection. The company could not let the walls at a rack rent, and, if they might use them for any purpose, it must be a use subordinate to the public purposes to which the bridge, as a structure, is in its whole devoted." These passages seem to me to establish that, although land dedicated to public purposes may be, or be capable of being, used for some purpose of profit, it does not follow that it is, or can be, let at a rack rent. Now, Tooting Beck Common is by the scheme and statute of 1873 dedicated to the public as a "common or recreation ground." The extent of the rights of the public is shewn by this, that it was considered necessary to insert express provisions authorizing the Metropolitan Board of Works to fence off for short periods such portions of the turf and grass as might require rest, and also to put up in a defined position a post and chain fence for the protection of the common against the straying of cattle. These rights of the public appear to me to be such as to render the common as a whole incapable of being let at a rack rent. It is stated in the special case that the common is let for grazing purposes; but I take this to mean that licences have been granted to feed sheep and cattle thereon subject to and consistently with the rights of the public; and any payments made in consideration of such licences appear to me to be similar in their nature to the profits which were suggested in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1) as possible to be earned by the letting of the parapet walls for advertisements. At all events, the letting for grazing purposes mentioned in the case does not, in my judgment, constitute a letting at a rack rent. Still less can this be said of the arrangements under which some small sums amounting to 5*l.* 19*s.* 6*d.* are paid in respect of licences granted to adjoining owners to have gateways opening on the commons with the view of preventing private rights being acquired by them. There are, however, two buildings to be considered—namely, the refreshment-room built on Tooting Beck Common and the inspector's lodge built on Tooting Graveney Common. Of these the former is the more important, first, because it is situate on Tooting Beck Common, and, secondly, because it is let to a contractor at an annual rent of 30*l*. Now, if this building abutted on the new street, I should, as at present advised, feel some difficulty in holding that the London County Council were not liable to contribute in respect of it. In fact, however, it is situate at a considerable distance from the new street and on a different part of the common. In the present case the London County Council are sought to be made liable, not in respect of this building as the owners of a house under s. 105 of the Metropolis Management Act, 1855, but in respect of a portion of the common free from any building and as owners of land bounding or abutting on a new street under s. 77 of the Act of 1862. The existence of the building can only be, and (I assume) is, justified as being "necessary for the maintenance or management of the common or recreation ground." If it be true, as I think, that the portion of the common which abuts on the new street is incapable of being let at a rack rent, I do not see that the case is altered because the London County Council have for the purpose just mentioned seen fit to erect on another part of the common a building which is capable of being so let. For the like reason, the existence of the lodge on Tooting Graveney Common does not appear to me to create a liability on the part of the London County Council. On the whole, I arrive at the conclusion that the appeal ought to be allowed.

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(1) 8 App. Cas. 687.

Mathew L.J. read the following judgment:—I cannot agree with the Divisional Court in the interpretation put in the case of *Fulham Vestry* v. *Minter* (1) upon s. 250 of the Metropolis Management Act, 1855. I do not think that the county council were owners of the land in question, nor were the moneys received by them a rack rent, within the meaning of the section. The county council had the legal estate in the land, which was vested in them for the perpetual use thereof by the public for exercise and recreation, and the erection thereon of such buildings and appliances as they might think requisite for those and the like purposes. They were in fact

(1) [1901] 1 K. B. 501.

for those ends the custodians and managers of the property. The premises could not be let at a rack rent, and could not be profitably occupied by the county council. Their tenure meant, as is shewn by the figures stated in the case, not income, but expenditure.

Sect. 250, it seems to me, was intended to describe persons who had, or who represented, proprietary rights in premises abutting upon a street. The charge for the improvements in question might properly be imposed upon such persons because the value of their interests was likely to be enhanced by the outlay. I do not think that the definition was intended to include imaginary or hypothetical owners. So far as the county council was concerned, the land by Act of Parliament was rendered sterile and deprived of any commercial value.

I am also unable to concur in the view that the moneys paid to the county council ought to be regarded as the best rent which could be obtained, and therefore amounted to a rack rent. The small sums received from the structures and appliances which the county council were empowered to provide bore no relation to the intrinsic value of the land. They have the character of the land upon which they stand. They are, like the land, devoted to the public purposes intended to be served. With respect to the receipt for herbage, it was necessary that the grass should be kept down, and this purpose was served by letting it to be grazed by sheep. This was probably a more economical process than mowing the grass from time to time and carting it away.

I think the appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *W. A. Blaxland.*

Solicitors for respondents: *W. W. Young, Son & Ward.*

E. L.

[IN THE COURT OF APPEAL.]

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March 19, 20, 24; *April* 7.

ANGEL *v.* MERCHANTS' MARINE INSURANCE COMPANY.

Insurance (Marine)—Constructive Total Loss—Policy on Ship—Cost of Repair—Value of Wreck.

By a policy of marine insurance a ship thereby insured was valued at 23,000*l.*, and that sum was to be taken to be the "repaired value," in ascertaining whether the vessel was a constructive total loss. The ship ran upon rocks off the coast of Sicily, and the owner thereupon gave notice of abandonment, which was not accepted by the underwriters. A salvage association, acting by the consent, and for the benefit, of all parties concerned, got the ship off, and she was temporarily repaired, so as to enable her to be brought to an English port. The shipowner having brought an action on the policy, claiming as for a constructive total loss, the judge at the trial found that, if the ship were permanently repaired, the total cost of repairs would amount to 22,559*l.*, and he refused to take into consideration the value of the wreck. He therefore held that there was not a constructive total loss of the ship:—

Held (by Vaughan Williams L.J., Stirling L.J., and Mathew L.J., the first mentioned doubting), that the shipowner was not entitled to add the value of the wreck to the cost of repair, in determining whether there was a constructive total loss of the ship.

Dictum in *Young* v. *Turing*, (1841) 2 Man. & G. 593, at p. 601; 58 R. R. 477, 484, not followed.

Appeal from the judgment of Bigham J. in an action tried by him without a jury.

The action was brought by the plaintiff, as owner of a steamship, claiming as for a constructive total loss of the ship (1), upon a policy of marine insurance, whereby the defendants insured the ship for a period of twelve months from July 17, 1900, against perils of the sea. By the policy the ship was valued at 23,000*l.*, and it was provided that the insured value should be taken as the "repaired value" in ascertaining whether the vessel was a constructive total loss. In March, 1901, the ship ran upon rocks on the coast of Sicily. The owner thereupon gave notice of abandonment, which the underwriters did

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(1) The action included other claims not material for the purposes of this report, in respect of some of which Bigham J. gave judgment for the defendants, and others were referred to an average adjuster.

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not accept. The ship was got off the rocks by a salvage association, acting by the consent, and for the benefit, of all concerned, on the terms that they were to receive nothing unless the ship were salved, and she was temporarily repaired so as to enable her to be brought back to an English port. The main question raised in argument, and in respect of which the case is reported, was whether, in determining whether there was a constructive total loss of the ship, the plaintiff was entitled to add the "damaged value" of the ship, the amount of which was suggested to be about 7000*l.*, to the cost of repair. The facts with regard to that question sufficiently appear from the judgments. (1) The learned judge gave judgment for the defendants on the question whether there had been a constructive total loss of the ship.

Carver, K.C., and *Loehnis* (*L. Noad* with them), for the plaintiff. The question in this case appears to have never been made the subject of actual decision until the judgment of Phillimore J. in the case of *Beaver Line* v. *London and Provincial Marine and General Insurance Co.* (2), which was followed by that of Walton J. to the same effect in *Wild Rose Steam Ship Co.* v. *Jupe* (3); but it is submitted that the general rule laid down by the authorities with regard to the question whether there is a constructive total loss, namely, that the test is, what course a prudent uninsured owner would have taken, must involve the consideration of the value of the ship to sell as damaged. The shipowner has to decide whether he will give notice of abandonment as soon as he receives information of what has happened to the ship, and must do so on the best estimate he can form. No prudent business man, in view of the necessary uncertainty as to the possibility of salving and bringing home the ship, in a case like the present, where, as the result shewed, the cost of repairs must approximate so nearly to the "repaired value" of the ship, would, having regard to the value of the ship to sell as a wreck, elect to repair her. In *Young* v. *Turing* (1) Lord Abinger C.B. said, obiter, that the "damaged value" of the ship must be added to the cost of repairs in determining whether there was a constructive total loss. The observations of Martin B. and Bramwell B. in the opinions given by them, in answer to the questions asked of the judges, in *Rankin* v. *Potter* (2), in the House of Lords, are to the same effect. Dicta may no doubt be found in the judgments in various cases, in which the test is expressed as being merely whether the "repaired value" of the ship will repay the cost of repair. But it is submitted that, though these expressions, upon the facts and figures in the particular cases in which they were used, may have been accurate enough, they were not intended as exhaustive definitions of constructive total loss, and should not be so construed.

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(1) A number of items and somewhat complicated questions of figures were involved in the ascertainment of the exact amount to be taken as the total cost of salving and repairing the vessel. It appeared to be admitted that some slight modifications of the figures as actually found by the learned judge must be made. It is however unnecessary to go into these details for the purposes of this report.

(2) (1899) 5 Com. Cas. 269.

(3) (1903) 19 Times L. R. 289.

[They also cited *Irving* v. *Manning* (3); *Fleming* v. *Smith* (4); *Grainger* v. *Martin* (5); *Somes* v. *Sugrue* (6); *Benson* v. *Chapman*. (7)]

J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants. The expressions relied on by the plaintiff, such as that in *Young* v. *Turing* (1), are, it is admitted, merely dicta. It is submitted that the dicta to be found in cases pointing to the conclusion that the value of the wreck ought not to be taken into account, and that the test is merely whether the ship is worth repairing, predominate: see, for instance, the judgments in *Moss* v. *Smith*. (8) The question in such cases is whether the loss is total or partial only, not what may be most to the commercial advantage of the assured. For the purposes of that question the shipowner is not to be regarded as a dealer in ships, but as a carrier of goods by sea. The question is not whether, regarding him in the former capacity, it would be better business for him to sell the ship as damaged than to repair her first. It is whether, regarding him in the latter capacity, the ship can be repaired, so as to be a useful cargo-carrying ship, at a cost which will not exceed her value when so repaired: see per Blackburn J. in *Rankin* v. *Potter.* (1) The contention for the plaintiff would make the contract of insurance an indemnity, not merely against the perils of the sea, but also against the chances and hazards of the market.

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(1) 2 Man. & G. 593, at p. 601; 58 R. R. 477.

(2) (1873) L. R. 6 H. L. 83, at pp. 135, 145.

(3) (1847) 1 H. L. C. 287.

(4) (1848) 1 H. L. C. 513.

(5) (1863) 4 B. & S. 9.

(6) (1830) 4 C. & P. 276; 34 R. R. 797.

(7) (1843) 6 Man. & G. 792; (1849) 2 H. L. C. 696.

(8) (1850) 9 C. B. 94.

[They also cited *Scottish Marine Insurance Company of Glasgow* v. *Turner* (2); *Kaltenbach* v. *Mackenzie* (3); *Aitchison* v. *Lohre* (4); Arnould on Marine Insurance, 7th ed. vol. ii., ss. 1120–1124; Phillips on Marine Insurance, 3rd ed. vol. ii., s. 1534; *Sailing Ship Blairmore Co.* v. *Macredie.* (5)]

Carver, K.C., in reply.

Cur. adv. vult.

April 7. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the judgment of Bigham J. in favour of the defendants in an action claiming as for a constructive total loss on a policy on ship. The ship was wrecked on the coast of Sicily, being driven on the rocks. There was from the first the hope that the ship might be got off, but the plaintiff (the shipowner) gave a notice of abandonment to the underwriters, which they did not accept. The ship was floated and brought to Malta by the operations of the salvage association acting for the benefit of all concerned, on the terms that they were to receive nothing unless the ship was salved. The cost of these operations was afterwards assessed at 3500*l.* The ship was to a certain extent repaired at Malta with a view to her proceeding under steam to Cardiff for permanent repairs. The underwriters agreed with the master for the navigation by the ship's crew of the ship when repaired from Malta to Cardiff for a sum of 1400*l.* The repairs somehow or other, although certified by surveyors to be sufficient, broke down almost immediately after leaving Malta; the fact being that it was only possible to get repairs of a very temporary nature done at

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(1) L. R. 6 H. L. 83, at p. 117.
(2) (1853) 1 Macq. 334.
(3) (1878) 3 C. P. D. 467.
(4) (1879) 4 App. Cas. 755.
(5) [1898] A. C. 593.

Malta. The ship was nearly lost, but succeeded in getting into Tunis. She was again temporarily repaired there, but was not allowed to proceed to England under her own steam, and was towed to Cardiff. Estimates were obtained at Barry for the repair of the ship, but she was not actually repaired before the trial before Bigham J. He arrived at the conclusion that 22,559*l.*, less some 200*l.* which the shipowner admitted he could not support, was the proper amount to fix as the cost of repairs. The repaired value of the ship the learned judge took as 23,000*l.*, which by the terms of the policy was to be taken as the "repaired value" in ascertaining whether the vessel was a constructive total loss. Bigham J., in estimating the cost of repairs, did not add anything for the expenses incurred by reason of the accident which compelled the ship to put into Tunis. This accident he attributed to the perils of the sea, and thought that the temporarily repaired ship could have been insured for the voyage to England for a premium of 150*l.*; and it was for this reason that he included nothing in the expenses of repair for expenses incurred by reason of the accident, and only included the insurance premium. Bigham J. deducted from the plaintiff's estimate of repairs certain items to which objection was taken by Mr. Griggs, the expert witness called on behalf of the defendants. As to several of these items, I am not sure that I should not have arrived at a different conclusion in fact. I do not, however, think that we ought to review the decision of the learned judge, arrived at after a five days' trial, on matters which in a sense are all questions of fact, for I treat estimates based on facts as matters of fact. A different finding on some of these objections by the underwriters would have been sufficient to make the expenses exceed the repaired value. I accept, however, as I have already said, the findings of the learned judge; and I only mention the dispute on these points to shew how little the figures relied on as constituting the items of the costs of repair, or the total arrived at thereby, can be relied on as factors in a mere arithmetical conclusion, especially in a case in which the learned judge thought, to use his own expression, that it was a very close thing, and so very near a constructive total loss that

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the underwriters might very well have paid it. The shipowner gives his notice of abandonment immediately after the marine accident. Precise estimates are, of course, impossible, and it seems to me that, unless the insured shipowner is to take upon himself risks which ought not to be borne by him (such as the risk whether the ship will be got afloat at all, or, having been got afloat, will arrive at a port for temporary repairs, and ultimately at home for permanent repairs), a large margin ought to be added to the figures of cost of repair to cover risks of this sort—risks which a "prudent uninsured owner" would certainly take into consideration in determining whether he should repair or sell.

There is, however, another consideration which it is suggested the "prudent uninsured owner" would certainly in fact have regarded in determining whether he should repair. I mean the "damaged value" of the ship—that is, the price which could be got for her as she lay unrepaired, which was, it was said, about 7000*l.* But, unfortunately, this part of the case was not very thoroughly gone into. The plaintiff in the earlier part of the trial seems to have been content to rely upon the estimates of cost of repair exceeding the 23,000*l.* Then, when it seemed likely that the deductions made by the judge would reduce the repairs below the 23,000*l.*, the claim to add the value of the damaged vessel was put forward and discussed, the judge, however, saying that there was no real evidence of the value. It seems unsatisfactory to have to discuss an important question of marine insurance law in a case in which the facts, perhaps, do not raise the question at all.

I do not think that it could be, or was, denied that the value of the damaged ship must be included in the calculation, if the ship had, in fact, been sold where she was and as she was, and the question, after sale, had been whether the circumstances justified abandonment. But it is said that this item of calculation must be disregarded if there is no such sale.

Now in my judgment the "prudent uninsured owner" test was clearly accepted as the proper test at least down to 1873. The recognition of the test in *Irving* v. *Manning* (1) and in

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(1) 1 H. L. C. 287.

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Rankin v. *Potter* (1) puts the matter, to my mind, beyond argument. Nor do I think that it is possible to say that *Moss* v. *Smith* (2), which was cited in *Rankin* v. *Potter* (1), had then been recognised as substituting for the "prudent uninsured owner" test an arithmetical test turning on the difference between estimated totals. The prudent uninsured owner test was, I think, adopted for the very purpose of covering considerations which cannot be embodied in the figures of an arithmetical calculation. I wish to observe that in *Moss* v. *Smith* (2) there was no approximation of the cost of repair and "repaired value," and that the alleged misdirection was a misdirection with regard to the freight (which was separately insured), inasmuch as the Chief Justice, it was said, omitted to tell the jury that, in determining whether or not there was a total loss of freight, they were to throw out of consideration the value of the ship, and to consider only whether a prudent owner, acting with a view to the earning of freight, would have executed the necessary repairs either wholly or in part. The Court held that there was no misdirection, and it is with reference to this that Maule J. made the observations which are relied upon as either substituting the "arithmetical" for the "prudent owner" test, or for limiting the measure in applying the prudent owner test to a contrast of the figures of "cost of repair" and "repaired value." There can be no doubt, to my mind, but that Bramwell B. and Martin B., in delivering their opinions in *Rankin* v. *Potter* (1), both recognised the value of the damaged ship as an item which was to be taken into consideration in the application of the "prudent uninsured owner" test; and, more than that, recognised the value of the damaged ship as an item going to make up the total of the figures to be contrasted with "repaired value." This view has been applied by Phillimore J. in *Beaver Line* v. *London and Provincial Marine and General Insurance Co.* (3), and by Walton J. in *Wild Rose Steamship Co.* v. *Jupe.* (4) It is to be observed that in *Rankin* v. *Potter* (1) the item of value of the damaged ship was essential to the conclusion that there

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(1) L. R. 6 H. L. 83.
(2) 9 C. B. 94.
(3) 5 Com. Cas. 269.
(4) 19 Times L. R. 289.

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was a constructive total loss. You cannot get the required result in figures without it. It is further to be noted that in *Rankin* v. *Potter* (1) the ship was not, in fact, sold.

It seems to me that, perhaps, the authorities could be reconciled if one took the rule to be that the shipowner could only take into consideration the value of the damaged ship if the cost of repairs approximated to the "repaired value." If the damage to the ship by the perils of the sea is so extensive that it is clear that the cost of repairs will approximate to the "repaired value," it would not be reasonably practicable to repair her if a substantial sum could be obtained for her as she is and where she is, seeing that the expense of repairs would be such that, under the circumstances, no man of common sense would incur the outlay. Such a ship, as a matter of business, is totally lost. Take, however, the case where the damage is slight. The cost of repair is small relatively to the value of the ship. The shipowner, as a matter of business, would not take into consideration the necessarily high value of the slightly damaged ship, unless, instead of desiring to minimize the loss incurred by the perils of the sea, he regarded the marine accident as affording a market enabling him to sell his ship at a profit. In my judgment, a case in which the cost of repair and the value of the ship so nearly approximate as they do in the present case would be just a case in which the "prudent owner" test, applied as I have suggested, would do justice, which the mere comparison of figures would fail to do. But there is no case which has recognised this modification in the application of the prudent owner test, and one hesitates to introduce such a modification in the rules of law governing so widely extended a business as that of marine insurance under British law, although the application of the prudent owner test, as understood by Bramwell B. and Martin B. in their opinions in *Rankin* v. *Potter* (1), and also by Lord Abinger in *Young* v. *Turing* (2), might lead to the results pointed out by the editors of the last edition of Arnould on Marine Insurance, Mr. de Hart and Mr. Ralph Simey, following a suggestion by Mr. McArthur in his work on marine insurance. It is suggested in the last edition of Arnould's Marine Insurance, s. 1124, that the dictum in *Young* v. *Turing* (1) is founded neither on principle nor on authority, and the editors say in a note: "Suppose a vessel comes into port requiring repairs costing 1000*l.*, her damaged value being 10,000*l.*, and her repaired value 10,500*l.*; this according to the argument derived from *Young* v. *Turing* (1)"—and, I would add, from the opinions of Bramwell B. and Martin B.—"would be a case of constructive total loss, but it is submitted that it is absurd to say a vessel is a total loss, whether constructively or otherwise, which is only damaged to the extent of 10 per cent. or less." The contention seems to be that the old test of a "prudent uninsured owner" was adopted at a time when there was no telegraph and the means of communication were difficult, and at a time when there was no salvage association ready to step in to salve the ship and take charge of her until she could reach a port where permanent repairs could be effectively executed, and where, therefore, the cost of the repairs could be measured either by the actual execution of the work or by reliable estimates obtained on invitations to tender. It is said that, at the time of the adoption of the "prudent owner" test, the master, through difficulty of communication and inability to secure with any certainty means of repair, was in practice apt to consider seriously the question whether he should sell the materials of the ship, or the ship as she lay, rather than make the attempt to repair. But it is said that nowadays such a case rarely arises, and that when it does the old test can be applied; but that now the conveniences of modern times, telegraphic communication, the salvage associations, and Lloyd's agents everywhere, throw on the master but rarely the old alternative, "repair or sell"; and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision. Such a rule seems to me too favourable to the underwriter. I think

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(1) L. R. 6 H. L. 83.

(2) 2 Man. & G. 593; 58 R. R. 477.

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(1) 2 Man. & G. 593; 58 R. R. 477.

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that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise data upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision. I doubt whether under the absolute arithmetical test the underwriter really takes upon him the whole of the risks of the perils of the sea. I think it was a doubt of this sort which made lawyers of the United States of America adopt the 50 per cent. rule.

The final result in this appeal, I think, must be that the judgment of Bigham J. must be affirmed: first, because I doubt whether in any case we ought to reverse his decision on this question of marine insurance law, having regard to the state of the evidence as to the value of the damaged ship, the manner in which the point was taken at the end of the trial, and the mode in which it was disposed of, and I am not prepared to do so. Moreover, even though my opinion were stronger than it is, I should not like to differ from my brethren on a point which does not properly arise on the evidence. I, therefore, do not differ from the judgment of my brethren that the judgment of Bigham J. must be affirmed.

STIRLING L.J. I agree that in this case we ought to accept the conclusions of fact arrived at by Bigham J. It is therefore to be taken that the value of the ship, when repaired, exceeded the expense of repairs by a sum of about 700*l*. or 750*l*. The learned judge mentioned a smaller figure, but I understand it to have been conceded in argument that some consequential corrections, which would have been the result of his determinations, would have brought the final sum to the figure I have mentioned.

It is then contended that the loss ought, nevertheless, to be treated as a constructive total loss, because the value of the ship, as she lay on the rocks, exceeded that sum, so that a prudent uninsured shipowner would have sold her rather than repaired her. Bigham J. rejected this contention, saying that there had not been adduced any evidence as to that value on which he could act. Now the evidence stood thus. No one was called on behalf of the plaintiff to shew what the value of the ship was at the time. Naturally none of the plaintiff's witnesses was cross-examined on the subject, nor was there any evidence of these matters adduced by the defendants. In truth the plaintiff seems to have launched his case in the expectation that he would be able to satisfy the judge that the cost of repairs would exceed the value of the ship when repaired; and it was only when he failed in satisfying the learned judge on that point that he fell back on this question of the value of the ship, and he now seeks to establish the amount from expressions which occur in the correspondence and in the light of subsequent events. I think there is much to be said in favour of the learned judge's view. I think that mere estimates of value not made at the time ought, in a case of this kind, to be closely scrutinized by the Court, and I hesitate to rely on inference with respect to a matter on which direct evidence can be given. I am not, therefore, persuaded that it would be right to overrule the decision of Bigham J.; and this would be sufficient to dispose of the case, so far as I am concerned. But a question of law has been argued, and, somewhat different views being entertained upon it by my learned brothers, it may be right that I should express the opinion that I have formed.

The case of *Young* v. *Turing* (1) was decided in the year 1841 in the Exchequer Chamber; and Lord Abinger, in giving the judgment of the Court, says: "The Chief Justice has laid down the usual and recognised rule that the jury ought to consider whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel." Then he says: "Now, to the value of the repairs must be added her value as she lay in the dock." It is upon that observation that the argument in this case is founded. It is to be observed that it is a mere dictum. It was not necessary for the decision of the case, and, so far as appears from

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(1) 2 Man. & G. 593; 58 R. R. 477.

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the report, did not form the subject of argument before the Court. In 1847 there was decided the case of *Irving* v. *Manning* (1) in the House of Lords, and Patteson J., who delivered the opinion of the learned judges who advised the House, says: "The course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired"; and, again, at a later point he says: "The established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost." In 1850 the case of *Moss* v. *Smith* (2) was decided, in which the question was very much considered, and judgments were given which are constantly referred to in subsequent cases. Maule J. says: "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of common sense would incur the outlay—the ship is said to be totally lost. It is in that way alone that the question, as to what a prudent owner would do, arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the Courts have adopted is this—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." Wilde C.J. says this: "The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea damage in such distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be

(1) 1 H. L. C. 287.

(2) 9 C. B. 94.

repaired at an expense which no prudent owner uninsured would incur: and that is when the outlay will exceed that which he will get by it, namely, when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her." Now it seems to me that in that case the Court defined, as Maule J. points out, the standard, the measure of prudence, which the Courts have adopted with reference to such a case. In the year 1854 there was published the 3rd edition of Phillips on Marine Insurance, and in s. 1534 the learned author states the law thus: "In English jurisprudence the right to make an abandonment of the ship is governed by the rule just stated, namely, that the right to abandon on account of the damage and expense merely accrues where, and only where, the ship when recovered or repaired will not be worth the expense necessarily to be incurred for the purpose of recovering or repairing it." Then he adds: "This rule has reference to a case in which the amount, merely, determines the character of the loss. Other circumstances may come into consideration in determining the loss to be partial or total." I do not cite these observations as authority, but as shewing the view taken of English law by a writer well qualified to form an opinion. I do not propose to go in any detail through the subsequent cases, but it appears to me that, notwithstanding the observations of Bramwell B. and Martin B. in advising the House of Lords in *Rankin* v. *Potter* (1), to which my Lord has referred, the weight of authority is in favour of the view which is based on the judgments in *Moss* v. *Smith* (2), and which is expressed in the language which I have just cited from Phillips on Marine Insurance. I should like, however, to refer particularly to the case of *Aitchison* v. *Lohre* (3), where the question whether or no there was a constructive total loss was discussed by the House of Lords. Lord Blackburn deals with the point on p. 761 of 4 App. Cas. He there says: "I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances."

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(1) L. R. 6 H. L. 83.

(2) 9 C. B. 94.

(3) 4 App. Cas. 755.

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He then says: "If such an uninsured owner chose to sell the hull as it lay, his position would be this"; and he goes through a calculation by which he arrives at a loss, amounting to 2521*l.*, and then he says: "And, if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course." Then he adds: "But in fact he not only could, but did repair it." Then he goes into a second calculation in which he ascertains the loss, with reference to the repairs and expenditure necessary for the purpose of repairing, and the value of the ship when repaired, and he arrives at an amount of loss smaller than that which he ascertained would have been suffered if a sale had been made. As I understand the figures, the result would have been the same, whether the value of the vessel, as the ship lay, was taken into consideration or not, and, therefore, so far, the case appears to me not to be a decision which guides us in the present case. But the way in which the learned Lord lays down the law in a subsequent passage appears to me to agree with the contention of the defendants in this appeal. He says: "The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But, if the ship can be practically repaired within the meaning of that phrase, as explained by Maule J. in *Moss* v. *Smith* (1), the assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option." It appears to me that the learned Lord there adopts the view of the law which is laid down in the judgments in *Moss* v. *Smith* (1), and which, as it seems to me, was subsequently laid down in the same manner by Lord Watson in the case of *Sailing Ship Blairmore Co.* v. *Macredie* (2) in the House of Lords.

For these reasons I have arrived at the conclusion that the

(1) 9 C. B. 94.

(2) [1898] A. C. 593.

value of the wreck ought not in this case to be taken into account.

I only wish to add that I do not say that evidence of the value of the ship as damaged can be entirely excluded in such cases as these, and therefore I do not differ from Phillimore J. and Walton J. in respect of what they did in the cases before them to which we have been referred, because their decisions appear to me only to have been as to the admissibility of the evidence. It may be that evidence of the value of the ship as a wreck may in some circumstances be material in ascertaining as a question of fact whether or no there was a total loss. I agree that the appeal should be dismissed.

MATHEW L.J. read the following judgment:—The plaintiff sought to establish his right to abandon to the underwriters by evidence that the costs of the repairs of the ship would exceed the repaired value. Bigham J. decided that the plaintiff had failed and that there was no constructive total loss. It has not been easy to follow the steps of the learned judge through a mass of evidence and argument submitted to him in the course of a trial that lasted over five days.

The vessel was insured by a time policy for 23,000*l.*, and by the terms of the policy the insured value of the ship was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel, while covered by the policy, was cast ashore on the coast of Sicily, and upon news of the disaster the assured gave a notice of abandonment which the underwriters declined to accept. With the consent of all concerned salvage operations were undertaken by the salvage association, and the ship was floated and brought to Malta at a cost of 3500*l.* In her damaged condition she was worth about 7000*l.* Under the superintendence of surveyors, who represented the plaintiff and the underwriters, temporary repairs to enable the vessel to be brought home were done at a cost of about 550*l.* The learned judge has found that the repairs were properly done. The underwriters had provided a sum of 1475*l.* to cover the expenses of the voyage home. This sum, added to the value of the damaged ship, could be insured from Malta

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to a home port for 150*l.* The vessel sailed from Malta, but in a few hours, as it would seem from some peril of the sea, her steering gear gave way and she was obliged to put into Tunis. Further repairs were found to be necessary, which were done at a cost of 218*l.* A tug was sent out from England to bring the vessel home at a cost of 750*l.* She was brought safely to Barry, and a tender was obtained to cover all necessary repairs. These sums of 218*l.* and 750*l.* would be covered by the insurance from Malta to a home port, and were held by the learned judge not to be charges which the owner would have had to meet. At the trial accounts were put in which had been prepared to shew the plaintiff's estimate of the costs of reinstating the ship. The total amounted to the very large sum of 26,222*l.* These figures were reduced by the learned judge to 22,559*l.* In the discussion before us the items allowed on the one hand and struck out on the other were objected to, and we were asked to review the decision of Bigham J. as to the cost of repairs. But I see no reason to differ from the conclusion that 22,559*l.* was a proper estimate of the outlay necessary to reinstate the ship. But it was contended for the plaintiff that, upon the assumption that the entire cost of repairs did not exceed the sum of 22,559*l.*, the plaintiff was nevertheless entitled to treat the loss as total. It was argued that the question to be determined was whether or not a prudent uninsured owner would abandon the adventure and sell the wreck as she lay on the rocks. In arriving at a conclusion on this subject, the owner, it was said, would take into account the value of the damaged vessel, and would certainly sell rather than repair. I am unable to agree with this reasoning.

The solution of the question whether there is a constructive total loss may sometimes be helped by considering what a prudent owner would do, where, for instance, a stranded vessel is immediately sold on the ground that salvage operations were difficult and the result uncertain. But it seems to me in such a case as the present, where the actual costs of repairs have been ascertained and are not altogether a matter of estimate, the matter cannot be dealt with on that footing. The question is not what an owner would consider the course most advantageous to himself. What has to be determined is to what extent the ship has been damaged by the perils insured against, and thus to settle whether the loss is partial or total. It is total if the prosecution of the voyage has become commercially impracticable. In recent times, with the readier means of communication open to underwriters, the condition of a stranded ship is rarely left to mere speculation. When notice of abandonment has been given, the skilled agents of the underwriters are enabled to visit the vessel, and they can generally form a sound judgment as to whether the ship can be saved. Where there is a fair prospect of reinstatement, salvage operations are undertaken on behalf of the insurers without requiring the owner to incur any expense. In this case the usual course was followed. The salvage operations succeeded, and the underwriters satisfied the learned judge that the loss was partial and not total. They arrived at this result by shewing that the cost of rendering the ship as serviceable as she was when insured was less than the repaired value. The argument that the real question was what an imaginary owner would do when his vessel was still on the rocks seems to me not to be open to the plaintiff. Any such general principle would seriously prejudice underwriters, and might impose upon them losses which were not due to the perils insured against. The test applicable here is that sanctioned in the many decisions referred to by counsel for the underwriters from *Moss* v. *Smith* (1) to *Sailing Ship Blairmore Co.* v. *Macredie.* (2) The rule seems to me to have been properly applied by Bigham J. But it was further urged for the plaintiff that, in determining the question of the right to abandon, the value of the damaged ship should be added to the cost of repair. With this addition the valuation fixed by the policy would be largely exceeded. The application of the supposed mode of calculation would seem to involve unreasonable results, for, in adjusting the amount the assured could recover under his policy, what is saved from the perils insured against is treated as having been lost. The authority relied upon by the plaintiff's counsel was a dictum of Lord Abinger in his judgment in *Young* v. *Turing.* (3)

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(1) 9 C. B. 94.

(2) [1898] A. C. 593.

(3) 2 Man. & G. 593, at p. 601; 58 R. R. 477.

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It was admitted that the point had not been dealt with in that case, either at nisi prius or in the Court of Common Pleas, and the observation of the Chief Baron was not necessary for the decision of the Court: and, further, that, with the exception of the recent judgments referred to in the argument, the authority of *Young* v. *Turing* (1) upon this point had not been judicially approved. It is noticeable that at the trial no evidence was offered to shew that average adjusters acted upon any such rule. The subject is discussed unfavourably to the plaintiff's contention in 2 Phillips on Insurance, s. 1534; Carver's Carriage by Sea, 3rd ed. s. 303, and 2 Arnould on Marine Insurance, 7th ed. s. 1124. I am of opinion that the plaintiff's contention fails, and that, in determining whether the ship can be repaired, the assured is not entitled to add the damaged value of the ship to the cost of repairs. I think for these reasons that the judgment should be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Downing, Bolam & Co., for Downing & Handcock, Cardiff.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 2 Man. & G. 593; 58 R. R. 477.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1903
April 7.

SILLES *v.* FULHAM BOROUGH COUNCIL.

Metropolis—Management Acts—Sewer—Drain—Drain receiving Drainage from more than one Building—Rain Water—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 250.

Where a drain was used for drainage of two adjoining houses, not being a drain for the drainage of a block of houses by a combined operation under the order of a vestry or district board:—

Held, that it was a "sewer" within the definition given by s. 250 of the Metropolis Management Act, 1855, although from one of the houses it carried away rain water only.

Appeal from the judgment of Wright J. in an action tried by him without a jury.

The action was brought to recover the amount expended by the plaintiff in executing work on a certain drain, which the defendants had by threat of legal proceedings compelled the plaintiff to execute, but which, he contended, they were themselves by law compellable to execute, the said drain being a "sewer" vested in the defendants.

It appeared that the plaintiff was the owner of two adjoining houses (1) (hereinafter described as house A and house B) in Hazlebury Road in the borough of Fulham. An underground pipe or drain carried sewage from house A into the main sewer. A gutter ran along under the eaves at the backs of both houses, by which rain water falling on their roofs was carried into a pipe passing down the wall of house A. This down pipe discharged by means of a gully into the underground pipe or drain draining that house as aforesaid. From house B only rain water was carried by this drain. A nuisance having been occasioned in this drain, the defendants gave notice to the plaintiff under s. 85 of the Metropolis Management Act, 1855, that the drain was in bad order and condition, and required cleansing, alteration, and amendment, and requiring the plaintiff to do the necessary work, and threatening legal proceedings in case he made default therein. It was not suggested that this drain was made for draining a block of houses by a combined operation under the order of a vestry or district board. The plaintiff did the necessary work, and brought the action to recover the cost of it from the defendants. The learned judge held on the authority of *Holland* v. *Lazarus* (1) that the drain in question was a sewer within the meaning of s. 250 of the Metropolis Management Act, 1855, and gave judgment for the plaintiff.

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(1) The same legal question arose with regard to other adjoining houses in the same road belonging to the plaintiff, but, the facts differing slightly as to the other houses, it has not been thought necessary to complicate the report by reference to them.

Macaskie, K.C., and *Sylvain Mayer*, for the defendants. The decision in *Holland* v. *Lazarus* (1) is not binding on this Court, and it is submitted that it was wrong. The terms "drain," "drainage," and "sewer" are used in s. 250 of the Metropolis Management Act, 1855, with reference to the conveyance of drainage and sewage in the ordinary sense of fæcal and refuse matter, and not with reference to the mere drainage of rain water. The fact that mere rain water from another house finds its way into a house drain does not convert that drain into a sewer which is used for the drainage of two buildings within the meaning of the definition given by the section.

[They also cited *Geen* v. *Newington Vestry* (2); *Reg.* v. *Godmanchester Local Board* (3); *Reg.* v. *St. Matthew, Bethnal Green.* (4)]

Mattinson, K.C., and *J. C. Earle*, for the plaintiff, were not called upon to argue.

VAUGHAN WILLIAMS L.J. It is admitted that this case is substantially governed by the decision in *Holland* v. *Lazarus* (1), assuming that decision to be correct. It appears from the decisions in that case and *Geen* v. *Newington Vestry* (2) that, where there are two drains from two buildings respectively—I speak first of drains both of which carry sewage or sewage

(1) (1897) 66 L. J. (Q.B.) 285.

(2) [1898] 2 Q. B. 1.

(3) (1866) L. R. 1 Q. B. 328.

(4) [1896] 2 Q. B. 319; [1898] A. C. 190, sub nom. *Bethnal Green Vestry* v. *London School Board.*

matter in the ordinary sense—that run together into one drain, which carries the sewage of both buildings, but which is not a drain made for draining a group or block of houses by a combined operation under the order of any vestry or district board, that drain is a sewer within the meaning of the definition of "sewer" given by s. 250 of the Metropolis Management Act, 1855. Further than that, the case of *Holland* v. *Lazarus* (1) decides that it makes no difference if, through one of the two drains draining the two buildings respectively, rain water only is carried from one of the buildings; and that the drain which ultimately carries off the rain water so discharged from that building and the sewage from the other building equally comes within the definition of a "sewer" given by the 250th section as if it carried sewage from both buildings. That section provides that "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." As I have said, the decision in *Holland* v. *Lazarus* (1) is to the effect that a drain comes within the terms of the definition of "sewer" given by the 250th section, where it is used for the drainage of two buildings, even although in respect of one of them it carries off only rain water. It seems to me that it was rightly so held upon the terms of the section, and that, where, as in this case, you have a drain which carries off sewage from one house, and into which another drain discharges drainage, though of rain water only, from a different house, the drain so receiving the drainage of both houses is a "sewer" within the definition contained in that section. In my opinion Wright J. properly applied the decisions to which I have referred to the facts of the present case. I think that this appeal must be dismissed.

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(1) 66 L. J. (Q.B.) 285.

STIRLING L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *W. W. Young, Son & Ward.*
Solicitor for defendants: *T. Blanco White.*

E. L.

1903
April 1.

ATTORNEY-GENERAL *v.* HOLDEN.

Revenue—Estate Duty—Gift of Personal Property—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

In view of the approaching marriage of the defendant it was agreed between his father and the bride's father that the latter would settle 20,000*l.* on his daughter on condition that the defendant's father would give to the defendant 10,000*l.* That sum was accordingly paid to the defendant by his father, and a settlement of the 20,000*l.* was executed, and the marriage subsequently took place. The defendant's father died within twelve months of the date of payment:—

Held, that estate duty was payable by the defendant on the 10,000*l.* under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

Attorney-General v. *Worrall*, [1895] 1 Q. B. 99; *Attorney-General* v. *Johnson*, [1903] 1 K. B. 617, followed.

INFORMATION by the Attorney-General claiming, on behalf of the Crown, estate duty under the Finance Act, 1894.

The facts as disclosed by the information were as follows: Upon a treaty for the marriage of the defendant and Beatrice Mary Byng Paget, the bride's father, Herbert Byng Paget, agreed to settle 20,000*l.* on condition that Henry Holden, the defendant's father, should give to the defendant 10,000*l.* Accordingly, on January 2, 1900, Henry Holden's bankers by his direction transferred 10,000*l.* belonging to him from his account to that of the defendant. On January 27, 1900, a marriage settlement was executed by which Herbert Byng Paget settled 20,000*l.* upon the usual trusts of the wife's fortune for the benefit of the intended husband and wife and the issue of the marriage. The marriage took place on January 31, 1900. Henry Holden died on February 1, 1900.

The information claimed that it might be declared that upon the death of Henry Holden estate duty became payable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, upon the said sum of 10,000*l.*, given by him to the defendant less than twelve calendar months before his death, as property passing on the death of Henry Holden.

The defendant by his answer stated that the payment to him of the 10,000*l.* was a condition precedent to any settlement by the bride's father; that the settlement would never have been made at all unless the defendant's father had paid the 10,000*l.*; and that sum would never have been paid unless the bride's father had agreed to make the settlement. The defendant contended that in the circumstances estate duty was not payable on the said sum.

Sir R. B. Finlay, A.-G., and *Vaughan Hawkins* (*Sir E. H. Carson, S.-G.*, with them), for the Crown. The question is whether, in the circumstances stated in the information, there was an immediate gift inter vivos of 10,000*l.* to the defendant from his father. If there was, then, the father having died within the year, estate duty is payable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, incorporating s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889. It is impossible to regard this transaction in any other light than as a gift of 10,000*l.* to the defendant, and it is none the less so because it was made in pursuance of an arrangement entered into by the defendant's father with the bride's father. The existence of consideration, assuming there was any, did not necessarily prevent a transaction from being a gift within the meaning of the Finance Act and the incorporated sections. In both *Attorney-General* v. *Worrall* (1) and *Attorney-General* v. *Johnson* (2) there was a valuable consideration moving from the donee to the donor, but the transactions were held to be gifts. Those cases are far stronger than, and are decisive of, the

(1) [1895] 1 Q. B. 99. (2) Ante, p. 617.

1903

ATTORNEY-GENERAL v. HOLDEN.

present case. By the Act of 1894 the word "voluntary," which occurs in s. 38, sub-s. 2 (*a*), of the Act of 1881, is struck out, the intention of the Legislature being to bring within the Act all transactions in the nature of marriage settlements, where the settlor dies within the year, because otherwise it might have been argued that the settlement was not voluntary, there being some consideration in all marriage settlements. The Act of 1881, as amended by the Act of 1889, aims at attempts to evade the payment of duty by gifts inter vivos. If the arrangement in this case had been that the father was to leave his son 10,000*l.* by will, it could not have been contended that estate duty was not payable; instead of that the money was paid to the defendant in his father's lifetime, and, the death having taken place within a year from the date of payment, estate duty is payable.

[They also referred to *Wheeler* v. *Humphreys* (1); *Crossman* v. *Reg.* (2); *Attorney-General* v. *Ellis.* (3)]

C. A. Russell, K.C., and *H. S. Simmons*, for the defendant. The defendant is not liable to pay estate duty on this sum. The essential idea in law of a gift is that it should be in its inception an act of bounty; as was said in *Attorney-General* v. *Ellis* (4), it must be made "freely, without compulsion," and "not under any obligation." Here, the money came to the defendant solely by virtue of an obligation imposed on his father under the bargain or arrangement made with the bride's father. The essential feature of a gift was lacking. The payment of this sum to the defendant was the only condition on which the bride's father would agree to make a settlement on his daughter. There was no desire or intention to evade the payment of estate duty. *Attorney-General* v. *Johnson* (5) and *Attorney-General* v. *Worrall* (6) are distinguishable. In both those cases there was a scheme to confer a benefit inter vivos which but for the Act of 1894 would have been made by will, thus shewing a clear intention to evade the Act. There is also another distinction, namely, that in both cases the Court was considering that part of s. 11 of the Act of 1889 which deals with the case of a gift with a reservation for the benefit of the donor.

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(1) [1898] A. C. 506.

(2) (1886) 18 Q. B. D. 256.

(3) [1895] 2 Q. B. 466.

(4) [1895] 2 Q. B. 466, at p. 470.

(5) Ante, p. 617.

(6) [1895] 1 Q. B. 99.

Ridley J. The question in this case is whether a sum of 10,000*l.*, which was paid to the defendant in the circumstances stated in the information and answer, was a gift within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. Now, the first case to which it is necessary to refer is *Attorney-General* v. *Worrall.* (1) In that case the decision was given (before the Finance Act, 1894, had come into operation) upon the Customs and Inland Revenue Act, 1889, which amended the Act of 1881 in such a way that the material words were, "shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforth retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise": words which were adopted by the Finance Act, 1894, and form a part of the section now under discussion. The point argued in that case was whether the transaction amounted to a gift. The defendant's father, the mortgagee, had released to the defendant the mortgage debt, and in exchange for that the defendant paid 575*l.* to the mortgagor, and agreed by covenant to pay to his father an annuity of 735*l.* That was a transaction of which it could certainly be said in argument that it was not a gift, but that it was a business transaction; however inadequate the consideration might be for the release of the debt, still it was a consideration; and it was contended, therefore, that there was not what one would call, in ordinary language, a gift. The decision of the Court of Appeal was that there was a gift of the mortgage debt to the son. Lord Esher said in the course of his judgment (2): "I think that it comes within s. 11, sub-s. 1, of the amending statute of 1889. It was in my opinion a 'gift' within that enactment. I have already said that what was given was the mortgage debt, which was personal property. Also, I think that possession of the property was not assumed and retained by the donee 'to the entire exclusion of any benefit to the donor by contract or otherwise.' It appears to me that the covenant by the son to pay an annuity to the father prevented this from being a pure and simple gift, and, therefore, it comes within the statutes." That is to say, the transaction was prevented from being a pure and simple gift because there was a covenant by the son with the father which shewed that the property did not remain to the entire exclusion of the donor; it was a gift, though not a pure and simple gift. The rest of the Court agreed with that decision, and it was followed in the case of *Attorney-General* v. *Johnson* (1), which was a case of somewhat the same nature, although there was introduced into it the question of a testamentary disposition.

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(1) [1895] 1 Q. B. 99.

(2) [1895] 1 Q. B. at p. 105.

On behalf of the defendant an attempt was made to distinguish both of those cases. It is said, in the first place, that they are distinguishable because the principle of a testamentary disposition does appear to have influenced the mind of the Court of Appeal in *Attorney-General* v. *Johnson* (1), whereas here it does not exist. It is quite true that it is referred to in the judgment of Vaughan Williams L.J., who was delivering the judgment of the Court of Appeal; but one cannot help seeing that the real ratio decidendi in that case was in support of the reasoning of *Attorney-General* v. *Worrall.* (2) The Lord Justice referred to the object of the statute, and stated that in *Attorney-General* v. *Johnson* (1) it was a gift of a testamentary nature. I cannot, however, accept the argument that that was the real reason of the decision of the Court, which, it seems to me, was based on the principle laid down in *Attorney-General* v. *Worrall.* (2)

The other distinction taken is that in the present case the transaction only comes within that part of the section which deals with gifts not made twelve months before the death of the donor, and that, therefore, the reasoning employed by the Court in deciding the question under the latter part of s. 11, sub-s. 1, of the Act of 1889 does not apply. It is true it does not in the same direct way apply; but I think that the reason-

(1) Ante, p. 617.

(2) [1895] 1 Q. B. 99.

1903

ATTORNEY-GENERAL v. HOLDEN.

Ridley J.

ing does apply for the purpose of determining whether this was a gift or not. It follows, therefore, that the fact that something was given in exchange, or covenanted or agreed to be given in exchange, by the donee does not prevent the transaction from being a gift if one can see from the nature of it that it was intended as a gift. In the case of *Attorney-General* v. *Worrall* (1) that was the nature of the transaction, and I think it is the same here. If a man says, "My daughter is going to be married to your son; I will settle so much on her if you will give your son 10,000*l.*," and then the father of the intended bridegroom gives the 10,000*l.* to his son, I think that the origin of the whole matter is a gift; and if so, it comes within the principle of the decisions to which I have referred. The transaction itself is of that nature. I do not depend merely upon the general language in which people would describe it, but I think it is so. There was no obligation which existed under which the defendant's father was bound to pay the money; but he made a gift to his son, in exchange for which he received nothing. So far this case, compared with *Attorney-General* v. *Worrall* (1), is an a fortiori case. Though the father received nothing, his daughter-in-law received a settlement upon her. It appears to me that by parity of reasoning with the case of *Attorney-General* v. *Worrall* (1) that fact must be regarded as not preventing what the father-in-law had done from being a gift. It might indeed prevent the transaction from being a pure and simple gift; although in this case I think it was in fact a pure and simple gift, because the consideration did not proceed to the defendant's father. But, however that may be, I am unable to find that there is anything in the circumstances of this case to distinguish it from the former decisions. I therefore think the judgment must be for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *H. G. Campion & Co.*

F. O. R.

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(1) [1895] 1 Q. B. 99.

C. A.

1903

April 21.

[IN THE COURT OF APPEAL.]

ELVIN *v.* WOODWARD & CO.

Employer and Workman—Compensation—Scaffolding—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman was injured by an accident while painting the outside of a house, more than thirty feet high, which was being repaired. In order to paint the lower part of the outside of the house he was standing, at the time of the accident, on painter's steps of a height of eight feet, constructed with steps on one side and wooden supports on the other. On appeal from an award under the Workmen's Compensation Act, 1897, in favour of the employers:—

Held (by Collins M.R. and Mathew L.J., Stirling L.J. dissenting), that there was evidence on which the county court judge could have found that the house was being repaired by means of a scaffolding within the meaning of s. 7, sub-s. 1, of the Act.

Appeal from a decision of the judge of the Shoreditch County Court upon an award under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the respondents, who were repairing and painting a house in Finsbury Square more than thirty feet in height. The upper part of the outside of the house had been painted by means of scaffolding which had been taken down, and the applicant was engaged in painting the lower part. To do this he used painter's steps reaching to a height of eight feet. There were ten steps on one side and wooden supports on the other, and while the applicant was standing on one of the steps, and was engaged in painting the wall of the house, above the height he could reach when standing on the ground, the whole structure slipped, and he fell to the ground and was injured. The county court judge was of opinion that the fact that the steps were used at the time of the accident to support the man who was doing the work afforded no evidence that the house in question was being repaired by means of a scaffolding. He added: "If the Court is of opinion that there was evidence on which I might find that the steps were 'scaffolding,' I award 1*l.* a week from fourteen days after the accident until ended, reduced, or varied"; and he made an award in favour of the respondents.

The applicant appealed.

Ruegg, K.C. (with him *Chester Jones*), for the applicant. There was evidence on which the county court judge could find that the steps were scaffolding within the meaning of the Act, and an award should have been made in favour of the applicant. This was not the case of a ladder used for the purpose of getting from one place to another as in *Marshall* v. *Rudeforth* (1), but of a construction actually used in the work that was being done as in *Veazey* v. *Chattle.* (2) As pointed out by Lord Macnaghten and Lord Brampton in *Hoddinott* v. *Newton, Chambers & Co.* (3), the question whether such a construction is scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. Lord Brampton, in the opinion that he gave, adopted the view expressed by Rigby L.J. in *Maude* v. *Brook* (4): "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act." The step-ladder that was being used in this case to raise the man from the ground, so that he might be able to do work that he could not otherwise reach, can properly be called scaffolding, and it was being used for the repair of the house.

A. Powell, K.C., and *W. Addington Willis*, for the respondents. The county court judge has found the facts, and then asks in effect whether he could properly direct himself that these painter's steps were scaffolding. He could not properly do so. Lord Macnaghten in *Hoddinott* v. *Newton, Chambers & Co.* (3) pointed out that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and in no common or ordinary sense of the word can a pair of steps be called scaffolding. The Act does not say that every man who, to do his work, raises himself by standing on something is to be treated as if he were using scaffolding. This step-ladder was no more scaffolding than the poles and planks that had constituted scaffolding, and had been taken down, and were lying about on the ground near at hand. If a pair of steps like this on which a man stands to do work is scaffolding, so would be a chair, a stool, or even a hassock, used for the same purpose. A scaffolding is a temporary structure made up with poles and planks, in order to support workmen engaged on work which they cannot reach from the ground, and nothing that does not come within that description is within the Act.

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(1) [1902] 2 K. B. 175.

(2) [1902] 1 K. B. 494.

(3) [1901] A. C. 49.

(4) [1900] 1 Q. B. 575, at p. 579.

Ruegg, K.C., in reply.

Collins M.R. At one time I should have held that these painter's steps could not be and were not scaffolding within the meaning of the Act. But the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (1) is not consistent with that view, for it decided that scaffolding may be external or internal, and that it includes an internal staging arranged with planks and trestles and without poles. That decision seems to me to have cut from under me the grounds on which my view rested. I find it somewhat difficult to discover a principle of law for the determination of what is "scaffolding." It has been held in this Court that it cannot be affirmed as a proposition of law that a ladder used in the ordinary manner is scaffolding. (2) On the other hand, this Court has held that a contrivance called a "crawling-board," and used in connection with a ladder, may be properly found to be scaffolding, affirming the decision of the same county court judge who heard the case now before us. The question was raised before him whether a painter's step-ladder can be scaffolding, and if he had confined himself to a decision in favour of the respondents I should not have found it possible to disagree with his decision, for there was evidence on which he could have found either way. It appears to me that what he has done is to give a decision based on the assumption that these painter's steps could not be scaffolding. But he has added that, if the Court is of opinion that there was evidence that the steps were a "scaffolding," the award should be in favour of the applicant, and he has not left it to us to send the case back to him for decision if we are of opinion that there was some evidence. I cannot myself see, having regard to the decision in the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (1), that an arrangement which affords a platform on which a man may stand to do his work can be distinguished from a staging composed of trestles and planks. It seems to me, therefore, in the case of painter's steps, affording their own support and bearing platforms at different heights wide enough to admit of a man standing on them to do his work, that I could not affirm as a proposition of law that such a structure cannot be "scaffolding." On these grounds, and on the question left to us by the county court judge, I think his decision in favour of the respondent cannot be supported, and that the appeal should be allowed.

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(1) [1901] A. C. 49.

(2) *Marshall* v. *Rudeforth*, [1902] 2 K. B. 175.

STIRLING L.J. I regret to say that I am unable to agree with the conclusion arrived at by the other members of the Court. The learned county court judge has found the facts in these terms: "I find that the applicant in this case was injured by a fall from steps on which he had been standing for the purpose of painting a wall above the height he could reach when standing on the ground. The steps were eight feet high, ten rungs, ordinary painter's steps." Those being the facts, the question before this Court is whether the structure so described can be held to be "scaffolding" within the meaning of the Act.

The House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (1) has described the way in which the Act is to be construed. Thus Lord Macnaghten at p. 57 of the report said: "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be." In the opinion given by Lord

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(1) [1901] A. C. 49.

Brampton (1) I find cited with approval the following passage from the judgment of Rigby L.J. in *Maude* v. *Brook* (2): "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act." Lastly, Lord Lindley at p. 77 of the report gave it as his opinion that "Anything which can fairly be called a scaffold is a scaffolding within the meaning of s. 7 if used as mentioned in the Act." Guided by these opinions, I have to ask myself if an ordinary pair of painter's steps used to enable a workman to paint a wall above his height can be properly or fairly regarded as scaffolding. Though I regret to find myself differing from my learned brethren, I feel bound to express my agreement with the view taken by the county court judge. In my opinion, the appeal fails and should be dismissed.

MATHEW L.J. I agree with the judgment of the Master of the Rolls. We have to look at the words used in the Act and to see what the Legislature meant. The word "scaffolding" is undoubtedly capable of a restricted meaning. In the ordinary use of language it would indicate a structure of poles and boards roped together for the purpose of building or repairing. I am not surprised that at one time that limited meaning of the term was adopted. But in *Hoddinott* v. *Newton, Chambers & Co.* (3) the House of Lords put a wider construction on the word, based, as it appears to me, upon the view that the purpose to which the structure was to be put was an element in determining whether it was or was not scaffolding. From this point of view it is clear that things which would not ordinarily be classed as scaffolding may be within that expression as used in the Act. Thus trestles and planks without poles were held to be scaffolding as being intended for a purpose for which scaffolding might be used, and as being effectual to enable a workman to do work upon a building. In this case we have steps so prepared as not merely to answer the ordinary purpose of a ladder, that of going up and down the height or part

(1) [1901] A. C. 49, at p. 69.
(2) [1900] 1 Q. B. 575, at p. 579.
(3) [1901] A. C. 49.

of the height of a building, but constructed for a special purpose with steps of such a width that a workman can stand on them and work from them. Such a structure answers all the purposes of scaffolding, and in my opinion comes within that term as used in this Act. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors for applicant: *Shaen, Roscoe, Massey & Co.*
Solicitors for employers: *Treadwell & Aylwin.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1903
April 24.

GILES *v.* BELFORD, SMITH & CO.

Employer and Workman — Workmen's Compensation — Dock Labourer — Average Weekly Earnings— Mode of Calculation— Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Sched.* (1.) (*b*).

A stevedore's labourer claimed compensation under the Workmen's Compensation Act, 1897, in respect of injuries occasioned to him by an accident on November 28, 1902, while in the employment of a firm of master stevedores. He was not engaged by the firm for any definite period, but had been from time to time employed by them, as labour was required, upon tendering himself for employment. During the year prior to November 28, with the exception of the months of May, June, and July, when he was in hospital, he had been employed by the firm upon a greater or less number of days in most weeks. He was not employed by the firm from the 2nd to the 10th of November, but on the days from the 11th to the 28th he was employed by them. The county court judge found that during the period between the 2nd and 10th of November he was not in the employment of the firm, but that from the 11th to the 28th he was continuously in their employment, and awarded him compensation based upon the average of his weekly earnings during the last-mentioned period:—

Held, that, notwithstanding the decision of the House of Lords in *Lysons* v. *Knowles & Sons*, [1901] A. C. 79, the decision of the county court judge was correct.

Jones v. *Ocean Coal Co.*, [1899] 2 Q. B. 124, followed.

Appeal from the award of the judge of the Bow County Court, awarding compensation to the respondent under the Workmen's Compensation Act, 1897.

The respondent was a stevedore's labourer, who was injured through an accident arising out of and in the course of his employment by the appellants, who were master stevedores. The accident happened on November 28, 1902, upon a steamship in the South West India Dock. The respondent had been in the habit of working for the appellants. He was not engaged by them for any definite period, but was employed by them, like other dock labourers, from time to time, as labour might be required, upon tendering himself for employment. He was paid by the hour. During the year prior to November 28, 1902, with the exception of the months of May, June, and July, when he was in hospital, he had been employed by the appellants upon a greater or less number of days in most weeks of the various months, his employment, however, being less frequent in the middle of winter than at other times. He was not employed by the appellants on any day from the 2nd of November to the 10th, but on the days from the 11th to the 28th he was employed by them, and he worked an exceptionally large amount of overtime beyond ordinary hours during that period. Owing to work having been abundant, and to the large amount of overtime which had been worked in that period, the average weekly earnings of the respondent taken with reference to that period worked out at a larger figure than if taken with reference to a year's working. The learned county court judge found on the evidence that the respondent was not at any time bound to present himself for work, nor, if he did present himself, were the appellants bound to employ him; and that, during the period from the 2nd of November to the 10th, he was not in the employment of the appellants, but that during the period from the 11th to the 28th of November he was continuously in their employment. He therefore awarded him compensation of 1*l*. a week until further order, based upon the average of the wages earned by him weekly during that period. In calculating this average, the county court judge took into account the amount earned by working overtime, being of opinion on the evidence that this was not casual employment, the system of working being such that the workmen were expected to, and would not have been employed, unless it was understood that, if required, they would, work overtime at an agreed rate of advance upon the ordinary payment.

Ruegg, K.C., and *W. Ellis Hill*, for the appellants. The county court judge estimated the workman's weekly earnings upon a wrong principle. In this case the workman had worked for the appellants, though somewhat irregularly, for a year. The county court judge should have taken the total of his earnings for the year, and divided by 52, in order to ascertain his average weekly earnings; or, perhaps, the judge should have ascertained the number of weeks of seven days the workman actually worked during the year, and divided the total earnings by that number. But to take a short exceptional period like that from the 11th to the 28th of November, in which much more than the ordinary rate of wages was earned by the workman, is obviously not ascertaining what in truth was the average of his weekly earnings. It has, no doubt, been held that, in a case where there has been a continuous employment for a period, and a break of that employment has taken place, and the workman has been subsequently employed again for a continuous period, in estimating his average weekly earnings under the 1st schedule of the Workmen's Compensation Act, 1897, only the later period of employment is to be regarded: *Jones* v. *Ocean Coal Co.* (1) But in the present case there was really no continuous employment at any time. The employment was casual daily employment, as the man's services were required. It has been held in *Lysons* v. *Knowles & Sons* (2) that a casual labourer whose employment has not lasted for two weeks is within the Act, although the mode of estimating compensation provided by the schedule is not strictly applicable to his case. In giving judgment in that case Lord Halsbury L.C. said: "I do not feel myself very much impressed by the discussion that we have had as to what the word 'average' strictly means. I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the

(1) [1899] 2 Q. B. 124.

(2) [1901] A. C. 79.

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average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another or one week with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' that his earnings were so much—not his agreed earnings by contract, there it would be definite—that, if a man was only employed at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid." It is submitted that what the Lord Chancellor there said is applicable to the present case, and shews that the county court judge in such a case as this ought to have estimated the average weekly earnings of the workman with reference to the whole year, and not merely to the period from the 11th to the 28th November, which did not really give the man's average rate of earnings. There is nothing in the express terms of the schedule which requires the period of employment with reference to which the average is to be taken to be continuous. The whole difficulty is occasioned by decisions such as *Jones* v. *Ocean Coal Co.* (1), which have read into the schedule the word "continuous." That was done at a time when it was supposed that the Act did not apply to the casual labourer, and that there must have been an employment for two weeks, in order that there should be a right to compensation under it.

[They also cited *Ayres* v. *Buckeridge* (2); *Keast* v. *Barrow Hematite Steel Co.* (3)]

Shakespeare, for the respondent. The point in this case was not before the House of Lords in *Lysons* v. *Knowles & Sons* (4), and the passage cited by the appellants' counsel has really no reference to it. All that was decided in that case was that the Act applied to casual labourers, and was not restricted to workmen who had been employed for two weeks at least. The decision of the House of Lords does not in any way negative the proposition established by the cases, that there must be continuous employment over the period with reference to which the average is to be taken: see *Jones* v. *Ocean Coal Co.* (1) *Williams* v. *Poulson* (2) was a case very similar to the present, and the decision there was in favour of the respondent's contention.

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(1) [1899] 2 Q. B. 124.
(2) [1902] 1 K. B. 57.
(3) (1899) 15 Times L. R. 141.
(4) [1901] A. C. 79.

Ruegg, K.C., in reply.

COLLINS M.R. This is an appeal from an award of the judge of the Bow County Court, awarding compensation under the Workmen's Compensation Act, 1897, to a stevedore's labourer. The judge finds as a fact that the employment in the course of which the workman was injured did not begin until November 11, and that he continued from that date in the employment of the same employers till November 28, on which day the accident happened whereby he was injured. The judge has assessed the compensation by reference to what the workman earned during that period, both in ordinary hours and by working overtime. He appears to have come to the conclusion on the evidence that the nature of the employment was such that the workman would be called on from time to time to work overtime, and it was understood that he would do so, when required, and therefore his employment in that way was not merely casual, and also that the days on which he worked ought not to be regarded each as a separate, casual, day's employment, but that there was an underlying presumption that the employment would continue until the completion of the work. The judge accordingly assessed the compensation on that footing. It is urged on behalf of the employers that the workman had in fact been employed by the same employers from time to time during a year. There was, no doubt, an interval during which he was incapacitated, but during the rest of the year he worked for them a greater or less number of days in most weeks of the various months, taking one week with another. The judge however, as I have said, has found that there was a complete break in the employment before November 11, and that the employment, out of and in the course of which the accident arose, did not begin till that day, and therefore he did not calculate the average amount of the workman's weekly earnings for the purposes of compensation by reference to any preceding period. In doing as he did, he followed, I think, the provisions of the 1st schedule to the Workmen's Compensation Act, 1897 (1.) (*b*). I do not think that there is any reason why in such a case as this the judge is emancipated from the directions given by that schedule. It may be that in certain cases, which cannot be brought exactly within the terms of the schedule, the county court judge must calculate the average rate of wages in the best way he can. The House of Lords in *Lysons* v. *Knowles & Sons* (1) has held that to be so. But there is nothing in that decision to relieve the county court judge from the obligation of following the directions of the schedule, where all the conditions required by the schedule exist. The 1st schedule provides, (1.) "the amount of compensation under this Act shall be": (*b*) "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." Then can it be contended that in this case the workman had been in the employment of the same employers for a period of twelve months previously to the accident? I do not think that it can, consistently with decisions of this Court, by which, unless and until they are overruled by the House of Lords, I think we are bound. The decision of the House of Lords in *Lysons* v. *Knowles & Sons* (1) that a casual labourer is within the Act does not appear to me to involve any dissent from the proposition that, in ordinary cases, in order that the average weekly earnings during twelve months may be the basis of the compensation, there must have been twelve months of continuous employment. Nothing was said in the judgments in *Lysons* v. *Knowles & Sons* (1), so far as I can see, inconsistent with that proposition. All that was there decided was that a workman is not debarred from

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(1) [1899] 2 Q. B. 124.

(2) (1899) 16 Times L. R. 42.

(1) [1901] A. C. 79.

compensation because his case cannot be brought within the precise terms of the 1st schedule to the Act. No dissent was expressed from the view taken by this Court in various cases, of which I may particularly refer to *Jones* v. *Ocean Coal Co.* (1), where Romer L.J. said that the employment contemplated by the 1st schedule is substantially continuous employment, and that a series of periods of employment cannot be added together, although periods intervene in which the workman had nothing to do with the employer. In this case we can apply the provisions of the schedule, and therefore we are not driven to frame some other standard for ourselves. The judge finds that the workman here had been long enough in a particular employment to establish a basis for an average under the schedule. He had not been in the employment continuously for twelve months, and therefore the county court judge has taken a less period during which he had continuously been in the employment of the same employers, and has calculated his average weekly earnings with reference to that period. It does not appear to me that there is any legal ground for interfering with his award.

STIRLING L.J. I agree. Speaking for myself, I feel bound to say that, if *Lysons* v. *Knowles & Sons* (2) had been the only authority with which we had to deal in this case, then I should have thought that, regard being had to what was said as to the meaning of "average earnings" in that case, particularly by Lord Halsbury L.C., there was a good deal to be said for the contention of the appellants, and that the question whether the county court judge was correct in the course which he adopted in this case was one requiring careful consideration. But there is a series of decisions in which this Court has dealt with the subject, and I cannot find anything in *Lysons* v. *Knowles & Sons* (2) which indicates an intention to overrule those decisions. In particular the decision of this Court in *Williams* v. *Poulson* (3) appears to me to be very much in point in the present case. There, in the case of a dock

(1) [1899] 2 Q. B. 124.
(2) [1901] A. C. 79.
(3) 16 Times L. R. 42.

labourer, who had been employed in a manner very similar to that in which the workman in the present case was employed, the principle was applied that the average weekly earnings must be calculated with reference to a period of continuous employment. It appears from the report that in that case the workman had worked in one sense for a considerable part of a year, but the employment was not in the strict sense continuous, the man only having been employed from time to time as his services were required; and, it having been found as a fact that there was no break in the employment, the compensation was held to be rightly assessed upon the average weekly earnings during the period for which the man had in this way worked continuously when the accident happened; and the question whether there was a break in the employment was treated as one of fact for the judge. In this case the county court judge came to the conclusion of fact that there was a break of employment prior to November 11, and took the average with reference to the period subsequent to that date. I cannot upon the authorities say that he was wrong in so doing.

MATHEW L.J. I am of the same opinion. There was, I think, evidence upon which the county court judge was entitled to find that there was a break in the respondent's employment before November 11. On the footing that there was such a break, he was bound by the plain language of the schedule, and could not assess the compensation with reference to the average earnings of the workman during the year prior to November 28. In assessing the compensation the right principle was adopted.

Appeal dismissed.

Solicitors for appellants: *Watson, Sons & Room.*
Solicitors for respondent: *Griffith & Gardiner.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1903
April 24.

VAMPLEW AND OTHERS *v.* PARKGATE IRON AND STEEL COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—"Workman"—Independent Contractor—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7, *sub*-s. 2.

Where a man was injured by an accident while doing work for manufacturers at their works as an independent contractor with them, and not as their servant:—

Held, that he was not a workman in their employment within the meaning of the Workmen's Compensation Act, 1897.

APPEAL from the refusal of the judge of the Rotherham County Court to award compensation to the dependants of a deceased workman under the Workmen's Compensation Act, 1897.

The deceased had been killed, while working upon the respondents' works at a place called "the pits," through the wire rope by which a tram was hauled breaking, and the tram consequently running over him. Evidence was given by the deceased's brother, of which the judge's note was as follows: "My brother worked there. He had a sub-contract. He worked breaking steel with a steel ball and breaking cinders with a stone, both of which belonged to the company. He was paid on tonnage of steel and cinders that he broke and cut. Part of his work was done in a place called 'the pits.' He would have occasion in the course of his work to go into 'the pits.' He had five men and two boys working under him." There was no further evidence as to the nature of the relation between the deceased man and the respondents. The county court judge found that the deceased was an independent contractor, and was not employed as a workman within the meaning of the Workmen's Compensation Act, 1897, and held that the dependants were, therefore, not entitled to compensation under the Act.

H. W. W. Wilberforce, for the appellants. The county court judge apparently acted upon the case of *Simmons* v.

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Faulds (1), which was cited to him. But the case of *Evans* v. *Penwyllt Dinas Silica Brick Co.* (2) was not called to his notice. The facts of that case were similar to those of the present, and it was there held that the workman was not an independent contractor. It is submitted, further, that it is not necessary that the workman should be merely a servant, in order to come within the Workmen's Compensation Act, 1897. The definition of "workman" given in s. 7, sub-s. 2, of the Act includes "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." [He also cited *Grainger* v. *Aynsley*. (3)]

Ruegg, K.C., and *A. Sims*, for the respondents, were not called upon to argue.

COLLINS M.R. This is an appeal from the judge of the Rotherham County Court, who found that the deceased man was an independent contractor, and not an employee of the respondents. If there was any evidence to support that finding, and the county court judge did not misdirect himself in arriving at it, this Court has no jurisdiction to interfere with his finding. The burden lies on the appellants of proving that the nature of the deceased man's employment was such as to bring the case within the Workmen's Compensation Act, 1897. The words of that Act defining a "workman" are no doubt very wide. But the cardinal feature apparent on the face of the Act is that it deals with the relation of employer and employed, as is shewn by the title of the Act, and by the words in the definition itself, "engaged in an employment to which this Act applies." Where a man undertakes to do work as a contractor, that, primâ facie at any rate, negatives the existence of the relation of employer and employed, and shews that the contract is not one of employment within the meaning of the Act. Here, the burden of proof being on the appellants, the evidence appears in substance to have been that the

(1) (1901) 17 Times L. R. 352.

(2) (1901) 18 Times L. R. 58.

(3) (1880) 6 Q. B. D. 182.

deceased man was engaged in breaking steel and cinders for the respondents; that he was paid so much per ton; and that he was responsible as a contractor for getting the work done, and himself employed workmen for that purpose, though of course he was not debarred from working himself. There was clearly, I think, evidence on which the county court judge was entitled to find that his position was that of an independent contractor, and not a servant. I think that, under these circumstances, the appeal must be dismissed.

STIRLING L.J. I agree. I confess that I should have felt better satisfied, if there had been clearer evidence as to the exact nature of the relation between the deceased man and the respondents, but the burden lies on the appellants of shewing that the deceased man was a workman in the employment of the respondents within the meaning of the Act; and on the evidence, as it stands, I think the county court judge was justified in finding as he did.

MATHEW L.J. I am of the same opinion. Upon the evidence before the county court judge he appears to have directed himself in accordance with the decision in *Simmons* v. *Faulds*. (1) It was urged for the appellants that his attention was not called to the case of *Evans* v. *Penwyllt Dinas Silica Brick Co.* (2), and that, if it had been, he must have arrived at a different conclusion. But, when that case is examined, it will be seen that there is no foundation for that argument. The ground of the decision there was the special arrangement come to that the applicant should be treated as a workman within the meaning of the Workmen's Compensation Act, 1897. I cannot say in the present case that the county court judge made any mistake of law in arriving at the conclusion of fact to which he came.

Appeal dismissed.

Solicitors for appellants: *H. G. Campion & Co., for Clegg, Sheffield.*

Solicitors for respondents: *Halse, Trustram & Co., for A. Muir Wilson, Sheffield.*

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(1) 17 Times L. R. 352.

(2) 18 Times L. R. 58.

E. L.

C. A.
1903
March 23.

[IN THE COURT OF APPEAL.]

DAVIS *v.* HYMAN & CO.

Practice—Partners—Action against Partner in Name of Firm—Execution against Person as Member of Firm—Issue to determine Liability—" Was or has held himself out as Partner in Firm."—Order XLVIII. *a, r.* 8.

In an action against the defendant firm, appearance was entered by one person as having been sued in the firm's name. Judgment was entered against the firm, and the plaintiff applied for a summons under Order XLVIII. *a*, r. 8, to determine whether another person was liable to have execution issued against him on the judgment:—

Held, that an order for an issue, in which the question should be whether that person "was or had held himself out as a partner in the defendant firm," was rightly made.

APPEAL from an order of Phillimore J. varying an order of a master.

The action was brought on a bill of exchange given in the name of the defendant firm in respect of goods sold and delivered by the plaintiff. The writ was served at the place of business of the firm, on a person having the control and management of the business, and an appearance was entered in the name of "Herbert Hyman, sued as Hyman & Co." The plaintiff made an application under Order XIV., and recovered final judgment. A summons was taken out under Order XLVIII. *a*, r. 8, on behalf of the plaintiff, asking that an issue might be directed to determine whether Sydney Maurice Hyman was liable to have execution issued against him on the judgment. The master made the following order intituled in the action: "It is ordered that the above-named plaintiff and Sydney Maurice Hyman proceed to the trial of an issue, wherein the plaintiff shall be the plaintiff and Sydney Maurice Hyman shall be the defendant, and that the question to be tried shall be whether the said Sydney Maurice Hyman was or has held himself out as a partner in the defendant firm." On appeal the learned judge made the following order: "It is ordered that the appeal be allowed so far as the terms of the issue to be tried are concerned; and it is further ordered that the issue to be tried shall be whether Sydney Maurice Hyman was at the date when the bill of exchange sued on was given or at the date when the goods were supplied a member of the defendant firm of Hyman & Co."

The plaintiff appealed.

Edward Clayton, for the plaintiff. The order of the master was right. Judgment has been given against the firm, and the plaintiff claims to be entitled to issue execution against S. M. Hyman " as being a member of the firm " : Order XLVIII. *a*, r. 8. Rule 1 of the order treats of " persons liable as co-partners," and rule 3 of " persons sued as partners in the name of the firm." The question to be determined is whether on some ground, either of actual partnership or otherwise, S. M. Hyman is liable to have execution issued against him. The order of the master is to that effect; but the order of the learned judge limits the inquiry to actual partnership.

Carrington, for S. M. Hyman. The rules are directed to ascertaining the liability of members of the firm, who would be taken to have notice of the proceedings. A person brought in to defend an issue on the ground that he held himself out as a partner would not necessarily have any previous notice of the action. There would be no service on him, and he would have no opportunity of raising any defence in the action. In *Wigram* v. *Cox, Sons, Buckley & Co.* (1) Cave J. pointed out that there must be service, either actual or constructive, of the writ to enable the plaintiff to proceed under Order XLVIII. *a*, r. 8.

Vaughan Williams L.J. I have not been able to appreciate the suggested hardship said to arise under the order of the master. The question whether this person held himself out as a partner is directed to be decided on the issue. If he has not done so, no execution will issue against him or his goods. If he has done so, he ought to be estopped altogether from denying his membership of the firm, and there would be no hardship in execution going against him in an action in which the writ was served against the partnership under Order XLVIII. *a*, r. 3.

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(1) [1894] 1 Q. B. 792, at p. 796.

It is said that the object of the appeal is that we should determine the form of words to be used under this order. All I can say is that I have only to decide this case, and the order of the master carries out the intention of the rule and inflicts no hardship on the defendant in the issue. As to whether as a general rule of practice it might be advisable to follow the exact words of the order I say nothing. I think the appeal should be allowed, and the order of the master should be restored.

STIRLING L.J. I am of the same opinion. Order XLVIII. *a*, r. 8, deals with the issue of execution where judgment has been signed against a firm, and provides for execution against the property of the partnership, against any person who has appeared in his own name, or admitted on the pleadings that he is a partner or been adjudged to be a partner, and against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. It then provides that, "If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined." Here we have a person who is alleged to be liable as a member of the defendant firm, and the only question which requires solution is whether his liability arises from his being a member of the firm or from his having held himself out as a partner. It seems to me that the order of the master properly provides for the determination of this question.

It is suggested that, if this form of order is adopted, the defendant in the issue might be deprived of some defence that he might have had if he had been served with the writ and had an opportunity of appearing in the action. As to this I would say that under the rule the question to be determined is the general one of the liability, as a member of the firm, of the person sought to be charged, and it seems to me that an issue could, in a proper case, be so framed as to include any proper defence. No such defence is suggested in the present case.

Mathew L.J. I am of the same opinion. I do not think there is any weight to be attached to the suggested hardship arising from such an order as this. The authority cited does not help the argument in this case, for it applies to a different state of circumstances, in which the plaintiff knew that the partnership had been dissolved when the action was originally instituted.

Appeal allowed.

Solicitors for plaintiff: *H. H. Wells & Sons.*
Solicitor for defendant in the issue: *Edward Le Voi.*

A. M.

In re A SOLICITOR.
Ex parte INCORPORATED LAW SOCIETY.

1903
March 31.

Solicitor—Misconduct—Inquiry—Report of Committee of Incorporated Law Society—Right of Complainant to be heard by Court—Necessity of appearing by Counsel—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), s. 13.

Sect. 13 of the Solicitors Act, 1888, by which an application to strike the name of a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their finding in a report to the High Court, provides that any person who but for the Act would have been entitled to apply to the Court to strike a solicitor off the rolls, or to require him to answer allegations, shall still be entitled so to apply, "and shall be entitled to be heard if the society brings the report of the committee before the Court":—

Held, that such an applicant could not be heard in person, but must appear by counsel.

Ex parte Pitt, (1833) 2 Dowl. 439; 39 R. R. 734, followed.

Report of the statutory committee of the Incorporated Law Society, under the provisions of the Solicitors Act, 1888.

It appeared that applications had been severally made by one C. R. Trueman and others that a certain solicitor might be required to answer the allegations of professional misconduct contained in several affidavits. The committee, having heard

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A SOLICITOR, *In re.* INCORPORATED LAW SOCIETY, *Ex parte.*

the applications and the evidence, found in regard to the charges made by Mr. Trueman that the charge of professional misconduct was not made out, but in regard to the other charges they reported that the solicitor had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888. (1)

B. A. Cohen, for the Incorporated Law Society, read the report.

The Solicitor appeared in person, and contended that the statutory committee had, in regard to the charges made by persons other than Mr. Trueman, arrived at a wrong conclusion.

Mr. Trueman, who appeared in person, claimed to be heard on the charges which he had made against the solicitor, and relied on s. 13 of the Solicitors Act, 1888, and cited *In re Lilley*. (2)

LORD ALVERSTONE C.J. We think it better to deal first with the application made to the Court by Mr. Trueman to be heard upon the consideration of this report. It is an important matter, and one in which we are reaffirming and not laying down the practice of the Court in regard to such applications.

The material words of the section on which Mr. Trueman's application is based runs as follows: "Provided that any person who but for this Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in

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(1) By the Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13, "An application to strike the name of a solicitor off the roll of solicitors . . . . or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee, in accordance with rules to be made under the authority of this Act. The committee, after hearing the case, shall embody their findings in the form of a report to the High Court of Justice . . . . and the Court may make such order thereon as to the Court may seem fit. Provided that any person who but for this Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the Court."

(2) [1892] 1 Q. B. 759.

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A SOLICITOR, *In re.* INCORPORATED LAW SOCIETY, *Ex parte.*

Lord Alverstone C.J.

an affidavit, shall be entitled so to apply although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the Court." That preserves the right of a person in Mr. Trueman's position in regard to two matters: he may either himself apply on the ground that he has a charge to bring against the solicitor, or, when the report of the statutory committee is before the Court, he is to be allowed to be heard upon it. It has been for many years the practice where applications are made against solicitors to require that they shall be conducted by counsel. The Act of 1888 only provides a modified, improved, and amended procedure, whereby the report of the statutory committee is brought before the Court, and action is taken thereon.

The point was raised in the case of *Ex parte Pitt* (1) in the year 1833. I refer to it not only because it is an authority on which this Court has acted continuously before the Act of 1888, but because the reasons of the judgment have as much weight to-day as they had at the time that the judgment was delivered. In that case a gentleman applied in person for a rule to shew cause why certain attorneys should not be required to answer certain matters contained in a certain affidavit. That was a much less stringent and serious application than the application to strike a solicitor off the rolls. According to the old practice there were two applications which might be made against a solicitor—one to strike him off the rolls, and the other to call upon him to answer the matters contained in an affidavit. The Court was dealing, therefore, in that case with the less serious form of application. The application was made to four judges, and Lord Denman, after consulting the other judges and the Master of the Crown Office, said this: "The motion against an attorney being in the nature of a criminal information, the Court requires that it should be made by a gentleman at the bar; and it cannot be made in person. Otherwise we have not the sanction of a barrister for the propriety of such an application. We cannot, therefore, hear you make this motion. The only case in which it appears that the Court ever interfered, where the application was made in person, was where a party demanded protection of the Court against an attorney; and, as it then appeared on his affidavit that the attorney had been guilty of great misconduct, the Court, of its own accord, directed that he should answer the matters stated in the affidavit of the applicant." In my opinion, for the purpose of entertaining an application to hear Mr. Trueman on the report, either to allege that the committee have not gone far enough, or that further action ought to be taken in the matter by sending the report back to the committee, the Court are entitled to the same safeguards that have always been thought necessary in respect to applications to strike a solicitor off the rolls, or to call upon him to answer allegations contained in an affidavit.

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(1) 2 Dowl. 439; 39 R. R. 734.

I desire to add that if we were dealing with an application that Mr. Trueman should pay costs in the matter, then either here or elsewhere he would be entitled to be heard in person against such an application. It is when a person seeks to put in force the amended jurisdiction of this Court under the statute of 1888 that the words "entitled to be heard" mean entitled to be heard in the way that is in accordance with the practice of the Court—that is to say, by counsel; and I think in regard to this matter that it is not possible for us to hear Mr. Trueman in person.

Wills J. I entirely agree. I have had a very considerable experience in cases of this kind, as for a long period when at the bar I represented the Law Society, and, during the fifty years and rather more that I have been in the profession, I have never known a case in which an application of this kind was heard either before or since the Act of 1888 in which the matter was not conducted by counsel. I think the reasons given by Lord Denman in the case my Lord refers to are quite as strong at the present time as they ever were before. I think it is a thoroughly sound practice, and ought to be adhered to.

Channell J. I entirely agree.

Mr. Trueman applied for an adjournment in order to instruct counsel; but this application was refused.

THE COURT then proceeded to deliver judgment on the report, and in the result held that the evidence did not justify the conclusion that the solicitor had been guilty of professional misconduct.

Solicitor for Incorporated Law Society: *S. P. B. Bucknill.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1903
April 21.

ATKINSON *v.* LUMB.

Employer and Workman—Compensation—Engineering Work—Employment within Area of Work—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7.

A contract was entered into for the construction of a reservoir and for laying down pipes for the supply of water from it. The contractor was engaged in constructing the reservoir by means of machinery worked by steam power, and had staked out and taken possession of the land in which the pipes were to be laid. A workman in the employment of the contractor was engaged in laying pipes in a trench, at a point 500 yards distant from the reservoir, by means of a crane worked by hand power. While using the crane he met with an accident which caused injury to his hand. On an application for compensation under the Workmen's Compensation Act, 1897. The county court judge found that the work of constructing the reservoir and laying the pipes was one piece of work, and made an award in favour of the applicant. On appeal:—

Held, that at the time of the accident the workman was employed on or in or about an engineering work, within the meaning of s. 7 of the Act.

APPEAL from an award of the judge of the Todmorden County Court under the Workmen's Compensation Act, 1897.

The applicant was a foreman in the employment of the respondent, who had contracted to construct a reservoir and filter-beds, and to lay pipes for the supply of water to Todmorden, a distance of about two miles. The reservoir was in course of construction, and the laying of the pipes was commenced at a point 600 yards distant from it. From that point to the reservoir the track in which the pipes were to be laid had been staked out, and possession had been taken by the respondent. The laying of the pipes had been finished, from the point at which a commencement was made, for about 100 yards in the direction of the reservoir, and a temporary tramway had been made for the conveyance of the pipes to the place where they were to be laid. They were unloaded by means of a crane worked by hand and of a wire rope connected with the crane. On the day of the accident the applicant was superintending the unloading and laying of the pipes, and while paying out the wire rope he sustained an injury to his thumb by reason of a broken strand. On the application for compensation the county court judge decided that the work which was being done under the contract did not come within the first part of the definition of engineering work in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, but that it came within the latter part of the definition as being "work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power" was used. He also held that the work of constructing the reservoir and laying the pipes was one piece of work, and that as it was engineering work the applicant's employment was upon "engineering work," and that he was entitled to compensation. An award was accordingly made in favour of the applicant.

The respondent appealed.

Adshead Elliott, for the respondent. The only question before the county court judge was whether the applicant was engaged in engineering work within the definition in the Act. The work he was actually engaged in was the use of a crane worked by hand. It is admitted that there was steam power used at the reservoir 500 yards distant from the spot where the applicant was injured. The work at the reservoir would, no doubt, be engineering work, but its limits are fixed locally just as the limits of a mine would be. The case is similar to *Chambers* v. *Whitehaven Harbour Commissioners* (1), where the engineering work was the dredging of a harbour, and the workman lost his life a mile and a half out at sea. So, in *Fenn* v. *Miller* (1), the workman was injured at a distance from the main work that was in hand. In each of these cases the workman was employed on something which was necessary for carrying out a work which, had he been employed directly upon it, would have brought him within the Act, but the necessity for the work he was doing did not bring that particular work within the Act. It may be that the work on the reservoir and the work on which the applicant was engaged were done under one contract, but that does not constitute each separate piece of the work done under the contract an "engineering work." The effect of holding otherwise may be illustrated by the water supply to Manchester. If the whole of that work is done under one contract, then, since there is steam power employed at Thirlmere, a man digging a trench within a mile of Manchester would be engaged on engineering work. Such a result could not have been in the contemplation of the Legislature.

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(1) [1899] 2 Q. B. 132.

E. Shortt, for the applicant. The judge has found that the work of making the reservoir and laying the pipes was one work, and that the contractor had taken possession of the land in which the pipes were to be laid. Under these circumstances the distance from the reservoir to the place where the applicant was working is immaterial, for he was engaged on the engineering work which consisted of making the reservoir and laying the pipes. In *Middlemiss* v. *Middle District Committee of Berwick* (2) the work was making a road, and a steam-roller was used for that purpose. The workman was employed in driving a watering cart, and he lost his life by an accident while at some distance from the steam-roller. The Court of Session held that he was employed on engineering work and came within the Act. That case is directly in point. The test, as pointed out by Collins L.J. in *Mason* v. *A. R. Dean, Limited* (3), is whether the workman is in the employment of undertakers who themselves are within the definition in the Act, and it does not matter in what particular department of the work the man is employed. From this point of view, on the findings of the judge, the applicant was employed "on" an engineering work, and, further, he was employed "about" an engineering work, for he was on the ground taken possession of for that work. The case is like that mentioned by Collins L.J. in *Fenn* v. *Miller* (1) of the curtilage of a factory beyond the actual limits of the building. What the applicant was doing was essentially part of an engineering work, and he was within the area of that work.

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(1) [1900] 1 Q. B. 788.

(2) (1900) 2 F. 392.

(3) [1900] 1 Q. B. 770, at p. 775.

Adshead Elliott, in reply. This case is distinguishable from *Middlemiss* v. *Middle District Committee of Berwick* (2), for the steam-roller was not fixed to one place, but traversed the whole distance of the road that was being made, and so would be used at the spot where the accident happened, though at the time of the accident it might have been some distance off.

COLLINS M.R. This is an appeal from an award of the county court judge in favour of the applicant. He was a workman in the employ of the respondent, who was contractor for the making of a reservoir and the laying down pipes for the supply of water from the reservoir. It is admitted that the making of the reservoir involved the use of machinery driven by steam, and would come within the definition of engineering work in s. 7, sub-s. 2, of the Act. The definition is as follows: "'Engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." That is the definition, and by the same section the Act is made to apply to "engineering work" as so defined. The county court judge has found that this particular work does not come within the first part of this definition. In dealing with the definition, I would call attention to the fact that the word "work" is used in two senses. In the first part it is used as meaning the labour bestowed, and in the second part as meaning that upon which the labour is bestowed, and it there indicates a physical thing embraced in a

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(1) [1900] 1 Q. B. 788, at p. 793.

(2) 2 F. 392.

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physical area. It is important to bear this in mind, because it emphasizes the distinction between this case and cases in which it has been held that a workman was not within the Act merely because he was engaged at the time of the accident on his master's business at a place not within the ambit of (for example) a factory. We are not concerned in this case with the labour bestowed by the workman, but with the thing, factory or otherwise, on or in or about which he was working. If, therefore, the man was at the time of the accident employed on an engineering work in the sense that he was employed on a physical thing that could be so described, he came within the Act. The judge has found as a fact that the area of the engineering work embraced the place where the accident happened, and when that is once arrived at the case is distinguished from the cases that have been cited. In *Chambers* v. *Whitehaven Harbour Commissioners* (1) a harbour was being dredged by a steam-dredger, and the mud raised was discharged from the dredger into hoppers, which when full were taken out to sea and there emptied. The hoppers were not actuated by steam. One of the workmen employed on the dredger went on one of the hoppers to assist in discharging it, and when a mile and a half out at sea was knocked overboard and drowned. The county court judge found as a fact that the workman, at the time of the accident, was not employed on or in or about an engineering work. The decision of the county court judge was supported by this Court, following its decisions in previous cases of a similar nature. There was no finding in that case that the place where the accident occurred was part of the area of the engineering work. The hopper was taken away to sea, and the case resembled that of the carting of produce of a factory to varying distances. The case of *Middlemiss* v. *Middle District Committee of Berwick* (2) was cited, and it is difficult to distinguish that case from the present. There a road was being repaired by means of a steam-roller, and a watering cart was being used in the work. The driver of the cart had left the place where the steam-roller was, and was watering a piece of road a quarter of a

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(1) [1899] 2 Q. B. 132.

(2) 2 F. 392.

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mile away. While at that distance he met with an accident which caused his death, yet he was held to be within the Act on the ground that he was employed on an engineering work at the time of the accident, the Court of Session holding that the physical area of that work extended to the place where the accident happened. In this case the finding of the county court judge is to a similar effect, and there was evidence to justify that finding. The appeal therefore fails, and must be dismissed.

Stirling L.J. I am of the same opinion.

Mathew L.J. I entirely concur, and for the reasons given by the Master of the Rolls.

Solicitors for applicant: *Firth & Co., for J. E. Craven, Todmorden.*

Solicitors for respondent: *W. Hurd & Sons, for Chapman & Brooks, Manchester.*

A. M.

FIELDING, APPELLANT v. TURNER, RESPONDENT.

1903
April 1, 8.

Gaming—Unlawful Gaming—Common Gaming-house—Shop containing Automatic Machine—Gaming House Act, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

The appellant, a shopkeeper, had in his shop an automatic machine which was worked on the following principle: A person desiring to use it put a penny in a slot and pressed and released a spring. According to the force with which this was done the penny fell into one or other of seven compartments. If it fell into either of two compartments it was automatically returned to the sender, and if it fell into the centre compartment he received from the machine a ticket entitling him to twopennyworth of articles sold in the shop. If, however, the penny fell into any of the other compartments it was retained by the machine. It having been proved that a number of boys and men had used the machine on certain days and had lost and won money by means of it, the appellant was convicted under s. 4 of the Gaming House Act, 1854, of having opened, kept, and used his shop for the purpose of unlawful gaming being carried on therein:—

Held, that the conviction was right.

CASE stated by justices.

The appellant, who was the occupier of a shop in Manchester Road, in the borough of Oldham, was convicted under the Gaming House Act, 1854, s. 4, for having unlawfully opened, kept, and used the shop for the purpose of unlawful gaming being carried on therein on the 12th, 19th, and 22nd days of April, 1902.

The facts were as follows. The appellant kept a shop wherein he sold sweetmeats, herbs, and herb-beer, and on the days in question he had on his shop counter an automatic machine working on the penny-in-the-slot system. The working of the machine was thus described in the case: "A person desiring to work the machine puts a penny in the slot, and then pulls down a spring by means of a knob, and then lets the knob go suddenly, and the spring flies up, and the penny is thus sent on its journey and may go into one of seven compartments. If it goes into either of two compartments the penny is returned to the sender. If it goes into one of four compartments the penny is retained in the machine and the

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sender gets nothing for it. If the penny goes into the centre compartment (the bull's-eye, as it is called) the sender receives from the machine a ticket entitling him to receive from the appellant twopennyworth of sweets, or it may be cigars or cigarettes." It was proved that on the days in question a number of boys and some men put pennies into the machine with varying fortunes, sometimes winning and more often losing. In cross-examination some of the boys who gave evidence admitted that there was some skill in working the machine, and that a person who was accustomed to it might win as often as he lost.

The question for the opinion of the Court was whether the appellant was rightfully convicted. (1)

Llewelyn Davies, for the appellant. This was not a game. A game cannot be played unless there are at least two players, and a person cannot play a game against an automatic machine.

But if it is a game it is a game of skill. The evidence shews that by constant use of the machine the person putting the penny in it can ascertain and use the proper amount of force requisite to send the penny into the winning compartment. But even if what the boys did amounted to "gaming," it was not "unlawful gaming" within the meaning of the section. In *Jenks* v. *Turpin* (2) Hawkins J. pointed out that in order to constitute "unlawful gaming" there must either be playing at games which are unlawful per se, i.e., games which have been declared unlawful by statute, or the game must be played in a common gaming-house. It has no doubt been decided that playing a game for money is gaming: *Dyson* v. *Mason* (3); but to make such gaming unlawful—if the game be not one of those specified—the game must be played in a common gaming-house: Russell on Crimes, vol. i. p. 291 (6th ed.). A common gaming-house has never been completely defined, but it seems clear that there must be circumstances of enormity and extravagance about it, such as the drawing together of disorderly crowds and causing great temptations to idleness: Hawkins P. C., bk. 1, c. 75, s. 6 (7th ed.); *Rex* v. *Rogier* (1); Blackstone Comm. vol. iv. c. 13, s. 8, p. 171 (8th ed.); Russell on Crimes, vol. i. p. 741 (6th ed.). In order to constitute a common gaming-house the gaming carried on in it must be excessive: *Jenks* v. *Turpin*. (2)

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(1) By s. 4 of the Gaming House Act, 1854 (17 & 18 Vict. c. 38), "Any person being the owner or occupier or having the use of any house, room, or place who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein . . . . may on summary conviction thereof before any two justices of the peace be adjudged by such justices to forfeit and pay such penalty, not exceeding 500*l.*, as to such justices shall seem fit . . . ."

(2) (1884) 13 Q. B. D. 505.

(3) (1889) 22 Q. B. D. 351.

This was not one of the specified games made unlawful by statute. The first Act on the subject was 33 Hen. 8, c. 9, which made it unlawful for persons of humble rank to play at certain named games, which included some games of skill. The 16 Car. 2, c. 7, and the 9 Anne, c. 14, both of which are now repealed, dealt with excessive or fraudulent gaming. Then came three Acts of George II.—12 Geo. 2, c. 28, 13 Geo. 2, c. 19, and 18 Geo. 2, c. 34—each of which prohibited certain specified games. In 1845 the 8 & 9 Vict. c. 109 was passed "to amend the law concerning games and wagers." This Act repealed so much of 33 Hen. 8., c. 9, as prohibited games of mere skill, and by s. 2 defined the evidence necessary in default of other evidence to prove a house to be a common gaming-house—that is to say, that such house must be kept or used for playing therein at an unlawful game, and that a bank is kept there by one or more of the players, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet. That definition in every respect excludes this case. The game, such as it was, was one into which skill entered; there was no banker, or person in the position of a banker; the chances of all the players were equal; and, finally, the house was not kept for the purpose of playing the game, but it was a shop in which this machine was only a casual piece of furniture. Every one putting a penny in the machine would enter the shop as a customer, and if he won he only got a ticket entitling him to some of the products sold in the shop.

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(1) (1823) 1 B. & C. 272; 2 D. & R. 431; 25 R. R. 393.

(2) 13 Q. B. D. 505.

R. B. D. Acland, for the respondent. Whatever may have been the main object of the house, it is within the section if unlawful gaming was permitted there.

[LORD ALVERSTONE C.J. We only require to hear you on the question whether what was done amounted to unlawful gaming.]

Gaming is unlawful either because it takes place in a gaming-house or because it is of such a nature that it is contrary to good morals. The amount of the stakes, or even the fact of winning or losing money, is not material. The Act of Henry VIII. prohibited even games of skill on the ground that they prevented people from attending to their duties to the State, such as practising archery; and although games of mere skill were allowed by the Act of 8 & 9 Vict., the principle of the Act of Henry VIII. still applies. In this case skill had no part in the game, since proficiency even if attained with one automatic machine would be of no avail with another in which the strength of the spring might be different. The case falls clearly within s. 2 of 8 & 9 Vict. c. 109, because, although there may have been no bankers, the other clause of the section is satisfied, and the chances of the players, including amongst the players the person against whom the persons putting pennies in the machine staked (that is to say, the appellant), were not equal. On the circumstances, what was done tended to demoralise the boys, and was therefore unlawful. *Santongeli* v. *Neilson* (1) has no application to this case, although the facts are similar, as that decision turned on the construction of another Act of Parliament.

Llewelyn Davies replied.

Cur. adv. vult.

April 8. The judgment of the Court (Lord Alverstone C.J., Wills and Channell JJ.) was read by

LORD ALVERSTONE C.J. This was an appeal from a conviction by the Oldham magistrates, by which the appellant

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(1) (1900) 3 F. (Just. Cas.) 13.

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was convicted under s. 4 of 17 & 18 Vict. c. 38 of keeping and using a house for the purpose of unlawful gaming. [His Lordship stated the facts as already set forth, and proceeded:—]

It was argued before us that the conviction was wrong on the ground that there was no evidence of unlawful gaming within the section. The first ground on which this contention was founded was that, if a game at all, the use of the automatic machine in question constituted a game of skill. We are clearly of opinion that this contention cannot be maintained. In the proper sense of the word, skill has no effect upon the act done by the person who puts the penny into the slot. No doubt continuous practice with the same machine might enable a person to acquire knowledge as to the strength of the particular spring, and thereby enable him to be more successful in making the penny fall into the centre compartment than in the case of a person who had not the same practice of the machine. On the first and probably on many occasions it is a pure question of chance into which compartment the penny will fall; no aim can be taken, and it is not unimportant to observe, in connection with another part of the case, that there are four compartments into which it can fall with no return to the person inserting it, as against one into which if the penny falls it will enable the person inserting it to receive a ticket of the nominal value of twopence.

It was then argued that there was no unlawful gaming because there was no individual who competed or played a game with the person who inserted the penny in the slot. This, we think, involves a fallacy. There are many lotteries and games of chance in which only the persons who actually stake take part; but here the holder or owner of the machine may be said to back his chance of the money falling into one of the four compartments, in which case it will be retained without return, as against the centre compartment, out of which alone any prize can be drawn. The keeper or owner of any such machine backs his chance against the person who uses it. Subsidiary contentions were raised that the keeping of such a machine in a shop was not keeping or using a room for the purpose of unlawful gaming within the section, but we are clearly of opinion that if the operation was unlawful the appellant was rightly convicted of keeping the room for the purpose; in fact, the only substantial question is whether or not, assuming the operation to constitute gaming, it was unlawful gaming within s. 4 of the Gaming House Act (16 & 17 Vict. c. 119). That Act contains no definition of unlawful gaming, but it refers in s. 2 to the Act 8 & 9 Vict. c. 109, and that Act enables us to ascertain what was the class of game or transaction which was considered to be unlawful. The preamble of that Act recited the Act of Henry VIII., which had undoubtedly included within its purview many games which were in every sense of the word games of skill, and s. 1 repealed the Act of Henry VIII. so far as it relates to these games. Sect. 2, which dealt with unlawful gaming, not only in houses occupied for that purpose and open to the public, but with houses which were alleged to be open for the use of subscribers only, enacted that in default of other evidence it should be sufficient in support of the allegation in any indictment or information that any house is a common gaming-house to prove "that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet, and every such house or place shall be deemed a common gaming-house." This section is somewhat difficult to construe, but in our opinion it does indicate that a game in which the chances are not alike favourable to all the players, including among the players the person by whom the games are managed, or against whom the players stake, is an unlawful game. We are of opinion that the operation of this machine falls within that definition, and that that being so the operation carried on was one of unlawful gaming, and that the appellant knowingly occupied the shop and permitted it to be used for that purpose. We were referred by Mr. Llewelyn

Davies to the case of *Jenks* v. *Turpin* (1), and, without saying that that case is a direct authority in favour of the view which we have expressed, the opinion of Hawkins J., at p. 524, and the opinion of A. L. Smith J., at pp. 532 and 533, support the view which we have expressed. With regard to the contention that because the money staked was only one penny the transaction is not within the statute, we are clearly of opinion that the smallness of the amount is not a conclusive test, but that the mischief pointed out by A. L. Smith J. of unlawful gaming may be present although the stakes are small. We are therefore of opinion that the conviction should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Keith & Humphries.*

Solicitors for respondent: *Chester, Broome & Griffithes, for H. Booth & Sons, Oldham.*

A. P. P. K.

STOCKDALE *v.* ASCHERBERG.

1903
April 23.

Landlord and Tenant—Tenancy for Three Years—Agreement by Tenant to pay Outgoings—Order by Sanitary Authority to reconstruct Drain—Liability of Tenant.

The plaintiff let a house to the defendant for a term of three years, the tenant agreeing to pay all "outgoings payable in respect of the premises." During the tenancy the plaintiff, in obedience to an order from the sanitary authority, reconstructed the drainage system of the house:—

Held, that the shortness of the term was no reason for putting a more limited construction upon the expression "outgoings" than that which would have been put upon it in a lease for a longer period, and that the defendant was liable under his agreement to recoup the plaintiff the expense of the drainage work.

Decision of Farwell J. in *Valpy* v. *St. Leonards Wharf Co.*, (1903) 1 L. G. R. 305, distinguished.

TRIAL before Wright J. without a jury.

By an agreement in writing dated March 25, 1902, the plaintiff, Mrs. Stockdale, let a house, No. 68, Brondesbury Villas, Kilburn, to the defendant for a term of three years at the yearly rent of 55*l.* By the said agreement the defendant agreed to pay "all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they become due, landlord's property tax only excepted."

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(1) 13 Q. B. D. 505.

On September 4, 1902, a notice was served upon the plaintiff by the Willesden Urban District Council, under the provisions of the Public Health Act, 1875, stating that a nuisance existed upon the premises and requiring the plaintiff to abate it, and for that purpose to take up and relay throughout the premises the existing drain, which was defective. The plaintiff, in obedience to the notice, executed the required work at a cost of 83*l.* 10*s.*, and the action was brought to recover that sum from the defendant under the above-mentioned agreement.

Hohler, for the plaintiff. The expense incurred by the plaintiff was an "outgoing" within the meaning of the defendant's covenant: *Aldridge* v. *Ferne.* (1) And in *Foulger* v. *Arding* (2), where the expense sought to be recovered was that of abating a nuisance by removing a privy and constructing a water-closet, Collins M.R. (3) treated it as clear that the word "outgoings" would cover such an expenditure. In *Brett* v. *Rogers* (4), where the landlord was required under the Public Health (London) Act, 1891, to take up a defective drain and relay it, it was held that the obligation was a "duty imposed in respect of the premises"; and that decision was approved by the Court of Appeal in *Farlow* v. *Stevenson.* (5) And the word "outgoing" is as comprehensive as the word "duty."

Foà (*A. Brown* with him), for the defendant. It may be that, according to the earlier cases decided before *Foulger* v. *Arding* (2), the terms of the present covenant would have sufficed to render the defendant liable. But that case constitutes a new departure. Collins M.R. there points out (6) that "underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract." The Master of the Rolls was there, no doubt, specially referring to the nature of the work to be done; but he must be assumed to have meant that, in considering whether the covenant covered the particular obligation, all the circumstances of the case must be looked at, including the length of the term, the locality, and the proportion which the rent reserved bears to the cost of the work. In *Valpy* v. *St. Leonards Wharf Co.* (1), where there was a lease of a cottage from year to year at a rent of 20*l.*, Farwell J. adopted the above-mentioned dictum of Collins M.R., and held that a covenant by the tenant to pay "outgoings" did include the expense of paving a yard in obedience to a notice from the local authority at a cost of 58*l.* In *Wilkinson* v. *Collyer* (2) the expenses sought to be recovered from the tenant, amounting to 27*l.* 16*s.*, were the apportioned part of the cost of paving the street upon which the premises abutted. The Court held that, having regard to the limited terms of the covenant in that case, the tenant was not liable; but Watkin Williams J. (3) added as a further reason for so holding: "Seeing that the term was for three years only, and the annual rent of the premises but 38*l.*, I cannot think the parties could have contemplated that such a burthen as this should be imposed upon the tenant." On the other hand, in *Batchelor* v. *Bigger* (4), where the lease was for three years at a rent of 75*l.*, Kay J. held that the payment of 68*l.* 15*s.* 11*d.* for the landlord's share of the expenses of paving the street came within the expression "outgoings," and that the meaning of that expression could not be affected by the shortness of the term. But that case is distinguishable from the present to this extent, that the fact of the street not having been already paved was perfectly apparent to the eye, and the tenant may reasonably be supposed to have contemplated that the local authority might possibly during the term require the work of paving to be done, whereas the defective condition of the drainage system of a house is not apparent, and, therefore, not equally within the contemplation of the parties.

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(1) (1886) 17 Q. B. D. 212.

(2) [1902] 1 K. B. 700.

(3) [1902] 1 K. B. at p. 707.

(4) [1897] 1 Q. B. 525.

(5) [1900] 1 Ch. 128.

(6) [1902] 1 K. B. at p. 706.

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(1) 1 L. G. R. 305.
(2) (1884) 13 Q. B. D. 1.
(3) 13 Q. B. D. at p. 9.
(4) (1889) 60 L. T. 416.

Secondly, assuming that the word "outgoings" primâ facie includes such an expense as the present, nevertheless its primâ facie meaning ought to be cut down if the context of the lease requires it: *Arding* v. *Economic Printing Co.* (1); and here the covenant refers to outgoings "for the time being payable," and "as they become due." That language points rather to the contemplated outgoings being of a recurrent nature, and not as including such an expense as the present, which is practically incurred once for all.

WRIGHT J. In this case I think I am bound by the decisions in *Brett* v. *Rogers* (2) and *Farlow* v. *Stevenson* (3), except with regard to two points—as to the effect to be given to the words "for the time being payable" and "as they become due," and as to the shortness of the term and the proportion which the rent reserved bears to the expenditure sought to be recovered. I do not think that the words "as they become due" can be regarded as cutting down the application of the covenant to costs of an ordinarily recurrent character. So to interpret those words would be to give them a more limited meaning than they would ordinarily bear. Nor, in my opinion, do the words "for the time being" assist the defendant's contention.

The other point presents greater difficulty. There has, no doubt, for a long time past been a tendency on the part of the Courts in cases of this kind to restrict the primâ facie meaning of the covenants by reference to the circumstances of the particular case; and that tendency has become more marked in recent cases. It is one, however, which I confess I have some difficulty in appreciating, for I cannot help agreeing with what Kay J. says in *Batchelor* v. *Bigger* (4), that "it is extremely difficult to say that a covenant, the words of which would, in the case of a term of twenty-one years, include a payment by the tenant, must be construed not to include it because the term is only for three years." The above tendency was perhaps carried to its extremest extent by Farwell J. in *Valpy* v. *St. Leonards Wharf Co.* (1) But all that case comes to is this—that the learned judge, applying the principle laid down by Collins M.R. in *Foulger* v. *Arding* (2), came to the conclusion that the expense of paving the yard could not be held to have been within the contemplation of the parties to a tenancy from year to year at a rent of 20*l.* If that was the ground of his decision, it cannot govern the present case. Here the tenancy was for three years, and the rent was 55*l.* The effect of what Collins M.R. said in *Foulger* v. *Arding* (2) is that, if the question could be considered without regard to the numerous decisions on the subject, it could not be doubted that the obligation to remedy a structural defect would come within the terms of a covenant such as we have here. He goes on to concede that there are certain extreme classes of obligation to which such a covenant would possibly not apply, and, in dealing with the question as to where the line is to be drawn, he says: "We are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract." Apply that to the present case. It cannot be said that the possibility of the landlord being called upon to put the drainage of his house in order can be regarded as altogether outside the contemplation of the parties. The obligation is one connected with the ordinary occupation of the house, and it is equally so connected whether the term of the demise is three years or twenty-one. There must be judgment for the plaintiff.

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(1) (1899) 79 L. T. 622.
(2) [1897] 1 Q. B. 525.
(3) [1900] 1 Ch. 128.
(4) 60 L. T. 416, at p. 418.

Judgment for the plaintiff.

Solicitors for plaintiff: *Sharpe, Parker & Co.*
Solicitors for defendant: *Potter & Heath.*

J. F. C.

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(1) 1 L. G. R. 305.

(2) [1902] 1 K. B. 700.

1903
April 24.

LISTER *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Common Carrier—Inherent Unfitness of Thing to be carried—Damage arising from—Liability of Carriers.

The defendants contracted with the plaintiff as common carriers to carry for them an engine from his yard to a neighbouring town on the defendants' railway. The engine was on wheels and fitted with shafts to allow of its being drawn by horses. While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke; the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either the plaintiff or the defendants, and could not have been discovered by any ordinary examination:—

Held, that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were excused.

Appeal from the Bradford County Court.

The plaintiff employed the defendants as common carriers to carry an engine from his yard to a neighbouring town on their line. The engine was on wheels with shafts to draw it, and had been purchased by the plaintiff second-hand a few months before. The defendants sent two men, two boys, and two horses for the purpose, and the men and boys were competent and the horses proper for the purpose. The horses were harnessed to the engine, which was drawn out of the yard, and whilst they were proceeding along the road one of the shafts broke, the horses took fright, became unmanageable and upset the engine, which was damaged in consequence. The shaft was rotten at the point where it broke, but this was not known either to the plaintiff or the defendants, and could not have been discovered by any ordinary examination. The county court judge was of opinion that the rule, that a common carrier is excused from liability for damage if it be caused by the inherent vice of the thing carried, is limited to cases in which the inherent vice itself directly causes the damage without any contributory act done by the carrier, as in the case of a vicious animal injuring itself, or overripe fruit becoming damaged by the pressure of its own weight; and he accordingly held that, as the shaft would not have broken but for the strain put upon it by the defendants' own act, its defective condition afforded no excuse.

The defendants appealed.

Scott Fox, K.C., and *R. Watson*, for the defendants. The limitation on the liability of a common carrier is laid down by Mellish L.J. in *Nugent* v. *Smith* (1) thus: "A carrier does not insure against acts of nature, and does not insure against defects in the thing carried itself; but in order to make out a defence the carrier must be able to prove that either cause taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss." The county court judge thought that in order to establish that the inherent defect was the "sole and direct" cause of the loss within that rule it was necessary to shew that the damage would equally have happened if the thing had not been carried at all. Therein he was wrong. The inherent defect remains the sole and direct cause, notwithstanding that it is rendered active by the act of the carrier, if that act was one which it was intended by the consignor that the carrier should do, or which it was reasonably necessary that the carrier should do in the course of the carriage. The self-inflicted injury of a restive animal or the damage caused to overripe fruit in the course of transit by railway is contributed to by the act of the carriers, inasmuch as they cause the noise that frightens the animal or the vibration that shakes the fruit together, but the noise and vibration are reasonably necessary and part of the ordinary incidents of carriage, and for that reason the carriers are excused. Here it was intended that the defendants should, or at all events contemplated that they would, carry the engine through the street in the way in which they did—by harnessing horses to the shafts.

Montague Lush, K.C., and *Edge*, for the plaintiff. The defect in the shaft was not the sole cause of the injury. The immediate cause was the act of the defendants. The liability of a common carrier stands on the same footing as that of an innkeeper, and an innkeeper is responsible unless the loss occurred through the fault of the guest. The carrier must equally be responsible unless the loss occurs through the fault of the consignor. But here the county court judge has found that there was no negligence or default on the part of the plaintiff.

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(1) (1876) 1 C. P. D. 423, at p. 441.

LORD ALVERSTONE C.J. I am of opinion that the county court judge has put a limitation upon the rule which is not justified by any authority. It must be taken that the engine was being conveyed in the ordinary way in which a common carrier would have conveyed it, and therefore no point can be made as to there being a possible alternative and safer mode of carriage. It may be that if there is no evidence of intention by the parties as to how the thing is to be carried, and there are alternative modes of carriage, one of which will give play to an inherent defect in the thing carried and the other of which will not, the carrier will be responsible if he adopts the former mode and damage results therefrom, unless indeed the adoption of the safer mode would involve the taking of precautions which it would be altogether unreasonable to require him to take. But that is not the case here. It is obvious that all parties intended that the engine should be taken to the station on its own wheels. The county court judge, in thinking that the rule as to the non-liability of a common carrier for damage caused by an inherent defect in the thing carried was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went much too far. When once you arrive at the fact that the thing is being carried in the ordinary way, and every precaution has been taken consistent with that mode of carriage, and the accident happens from the unfitness of the thing for that mode of carriage, the carrier is not responsible.

WILLS J. I am of the same opinion.

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CHANNELL J. I agree. I think the proposition may be stated thus: The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases.

Appeal allowed.

Solicitors for plaintiff: *Gordon, Hunter & Macmaster, Bradford.*

Solicitor for defendants: *Moorhouse, Manchester.*

J. F. C.

DRISCOLL, APPELLANT *v.* BOROUGH OF BATTERSEA, RESPONDENTS.

1903
April 8, 9.

Metropolis—Management—New Street—Paving Expenses—"Owner"—Building Agreement—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), s. 250.

The owner in fee of land made an agreement with a builder whereby it was agreed that the builder might enter upon the land and should build houses thereon, and that a lease should be granted of each house when erected, and that the builder should in the meantime pay 200*l.* a year (which was not a rack-rent) until the leases were granted, and that "this agreement is intended to operate as an agreement only and not as an actual demise of the premises, or to give the intended lessee any legal interest therein until the leases hereinbefore agreed to be granted shall have been executed." The land had not been used, and no houses had been erected by the builder:—

Held, that the builder was not the owner of the land within the meaning of s. 250 of the Metropolis Management Act, 1855.

Holland v. *Kensington Vestry*, (1867) L. R. 2 C. P. 565, followed.

CASE stated by a metropolitan police magistrate.

The appellant Driscoll was summoned by the Battersea Borough Council for the recovery of 352*l.*, under s. 105 of the Metropolis Management Act, 1855, being the sum apportioned by the council upon him, as the "owner" of a plot of land in a new street, towards the estimated expenses of paving the street.

One Boyton was the owner in fee of the plot of land, and on May 31, 1898, an agreement in writing was made between him and Driscoll, in which he was described as the "intended lessor" and Driscoll as the "intended lessee." The material clauses of that agreement were as follows:—

(1.) "It shall be lawful for the intended lessee (subject to the proviso for re-entry hereafter contained) to enter upon and retain possession of all that plot of land," &c. (2.) "The intended lessee will immediately after the signing of this agreement commence and thenceforth continue with all diligence to erect . . . . thirty-two houses on the said plot of land . . . . and shall expend upon each of the said houses 600*l.* at least." (4.) "The intended lessee shall cover in the said houses within nine months from the date hereof," &c. (6.) "The intended lessee shall not, without the consent of the intended lessor in writing first had and obtained, remove from off the said land for sale or otherwise any turf or mould whatsoever, or any clay, gravel or brick-earth, or other materials which may be taken or excavated therefrom. And it is hereby agreed and declared by and between the parties hereto that all building and other materials brought by the intended lessee upon any part of the said plot of land shall, whether affixed to the freehold or not, become the property of the intended lessor." (7.) "The intended lessee shall and will in the meantime until leases have been granted in pursuance of the contract or agreement for the purpose hereinafter contained of all the plots of land hereby agreed to be demised well and truly pay unto the lessor . . . . by way of rent for the said plots of land or for the part thereof of which a lease or leases shall not for the time being have been actually granted hereunder the sum of 200*l.* per annum, or so much thereof as shall not for the time being have been reserved by any lease or leases for the time being actually granted hereunder, such rent to be paid by equal quarterly payments . . . . free and clear of and from all deductions and outgoings whatsover." And it was agreed that if at any time any part of the rent should be in arrear for twenty-one days the intended lessor might enter and distrain "upon the premises hereby agreed to be demised, and of which no lease shall for the time being have been actually granted, in the same manner as if it had been rent reserved under an actual lease of such premises . . . . The intended lessee . . . . shall in the meantime, until leases reserving the aggregate sum of 200*l*. shall have been granted, well and truly observe, perform, fulfil, and keep (so far as regards such portions of the said land hereby agreed to be demised, of which leases shall not have been granted, and so far as the circumstances of the case shall admit of such observance) all and every the covenants and agreements hereinafter stipulated for and agreed to be inserted in such leases by or on the part of the lessee . . . . in like manner as he would be bound to do if such leases of those portions had been actually granted to him hereunder." (8.) "Upon a certificate signed by the said surveyor of the intended lessor that the carcase of any house has been erected and covered in upon any parts of the said plot within the time limited by clause 4 of this agreement, and in conformity with the terms of this agreement or otherwise to the entire satisfaction of the said surveyor, and on payment by the intended lessee of all money (if any) due to the lessor the intended lessor will (if the intended lessee shall not have forfeited his right to the same) grant or procure to be granted to the intended lessee or his nominee or nominees a lease of such house for a term of ninety-nine years from the 24th June, 1898." (9.) A proviso that if the yearly rent thereby agreed to be paid should be in arrear for twenty-one days, or if default should be made in the observance of any of the agreements and stipulations on the part of the intended lessee, the intended lessor might re-enter upon the land or any part thereof remaining to be demised in pursuance of the agreement, and hold and enjoy the same as if the agreement had not been entered into. And that "upon such re-entry all right and interest whatsoever of the intended lessee under this agreement in or in respect of the premises so remaining to be demised or any part thereof shall wholly cease and determine." (11.) Agreement that "upon such re-entry as aforesaid all walls, buildings, &c., which shall then already have been built, erected, or set up upon the land remaining to be demised as aforesaid, or any part thereof, shall thereupon be and become the absolute property of the intended lessor, and the intended lessee shall not be entitled to any payment or compensation in respect thereof or in respect of any works executed by the intended lessee upon the said land." (12.) "This agreement is intended to operate as an agreement only, and not as an actual demise of the premises or to give the intended lessee any legal interest therein until the leases hereinbefore agreed to be granted shall have been executed." (13.) "The tenant to have the first refusal of purchasing the freehold ground-rent (whatever it may be) at the price of twenty-eight years' purchase."

No houses were built or commenced to be built upon the land, and it had not been used by Driscoll. A notice-board was put up by Driscoll upon the land with the words "Trespassers will be prosecuted. By order of the owner." Driscoll was the person therein referred to as "owner." Driscoll regularly paid the 200*l.* a year to Boyton in accordance with the terms of the agreement.

It was contended that Driscoll was not the "owner" within the meaning of s. 250 of the Metropolis Management Act, 1855 (1), but that Boyton was the "owner." The magistrate found as a fact that the 200*l.* a year was not the rack-rent of the land; and he held that, upon the true construction of the agreement, Driscoll was the person who would receive the rack-rent, if such land were let at a rack-rent, and was therefore the "owner" within the meaning of s. 250.

G. Humphreys, for the appellant. The appellant was not the "owner" of this land within the meaning of s. 250. He would not receive the rack-rent of the premises if they were let at a rent. Boyton was the owner, and would be entitled to receive the rack-rent if the premises were let at a rack-rent. This case is governed by the decision in *Holland* v. *Kensington Vestry* (2), where it was held that, under a building agreement containing a clause to the same effect as clause 12 of this

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(1) 18 & 19 Vict. c. 120, s. 250: "In the construction of this Act the word 'owner' shall . . . . mean the person for the time being receiving the rack-rent of the lands or premises, in connexion with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

(2) L. R. 2 C. P. 565.

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agreement, the freeholder and not the intended lessee was the "owner" within the meaning of s. 250. Driscoll had no interest, either legal or equitable, in the land until he should become entitled to a lease. The Judicature Act and the decision in *Walsh* v. *Lonsdale* (1) have made no difference in that respect, because Driscoll never did become entitled to have a lease.

S. Mayer, for the respondents. The case of *Poplar Board of Works* v. *Love* (2) is a conclusive authority in favour of the respondents. In that case the position of the builder was precisely the same as that of Driscoll under this agreement. In *St. Helen's Corporation* v. *Riley* (3) the builder was held to be the "owner" within the meaning of the Public Health Act, 1875. The case of *Holland* v. *Kensington Vestry* (4) is clearly distinguishable, for the point was raised with respect to a garden only, and was not taken at all with respect to the houses. Further, the effect of that case has been done away with by the Judicature Act and *Walsh* v. *Lonsdale* (1), the intended lessee now having an equitable interest under the agreement. Clause 12 of the agreement does not say that Driscoll shall have no equitable interest, but only that he shall have no "legal interest." There is the same definition of "owner" in the Public Health (London) Act, 1891, and the cases of *Truman* v. *Kerslake* (5), and *Caudwell* v. *Hanson* (6) decided under the earlier Act, shew that Driscoll is the owner. Although under the terms of the agreement Driscoll cannot in fact let at a rack-rent, yet he may be the "owner": *Bowditch* v. *Wakefield Local Board*. (7)

G. Humphreys, in reply. The cases under the Building Acts are not in point, the language of those Acts being different. In *Poplar Board of Works* v. *Love* (2) there was no clause similar to clause 12 of this agreement, and the builder was a tenant under the agreement.

LORD ALVERSTONE C.J. I think that this appeal ought to be allowed. Speaking broadly, there seem to be equally good reasons for fixing the liability upon the one party as upon the other. It is necessary, therefore, to go closely into the matter in order to see what the rights of the parties are. The words of the statute are: "the person for the time being receiving the rack-rent of the lands or premises . . . . whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." That I understand to mean the person who would so receive the rack-rent either on his own account or as agent or trustee. Unless the Judicature Acts have made a difference, I do not think that this case can be distinguished from *Holland* v. *Kensington Vestry*. (1) In that case Willes J. said: "before the building agreement Lord Holland was certainly the owner of the land, and unquestionably liable to the charges now in question, and I think it may be safely said that no agreement between private individuals can have discharged him of that liability, unless it has fixed it on some other person." In this case, therefore, in order to make Driscoll liable, it must be shewn that the original liability of Boyton as owner has been transferred to him, so that he has become the person who would be entitled to receive the rack-rent. The case of *Poplar Board of Works* v. *Love* (2) was cited as being inconsistent with *Holland* v. *Kensington Vestry* (1), but I do not think that it is so. The report is not very clear, but the contention that the case was governed by *Holland* v. *Kensington Vestry* (1) seems to have been rejected, because there was not in the agreement in the *Poplar Case* (2) any clause similar to that in the *Kensington Case* (1) and in clause 12 of this agreement, and Blackburn J. states that the building owner was not in receipt of the rack-rent. The conclusion at which I arrive upon a consideration of the two cases is that one has to look at the position of the parties and say, rebus sic stantibus, who would be entitled to receive the rack-rent. I confess that the terms of this agreement make the question very arguable, but I think that Boyton did desire to reserve all his rights as owner (though the word "equitable" is not used) until the

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(1) (1882) 21 Ch. D. 9.
(2) (1874) 29 L. T. 915.
(3) (1883) 47 J. P. 471.
(4) L. R. 2 C. P. 565.
(5) [1894] 2 Q. B. 774.
(6) (1871) L. R. 7 Q. B. 55.
(7) (1871) L. R. 6 Q. B. 567.

(1) L. R. 2 C. P. 565.

(2) 29 L. T. 915.

leases were granted. The clause runs thus: [His Lordship read the clause.] Certainly some doubt is raised by the clause giving an option to purchase. It seems to me, however, that the matter rested in contract, and contract only, and that the contract was that no interest in the land should pass until the leases were granted, and that the leases were not to be granted until the houses were built. In my opinion, therefore, under this agreement Boyton remained the owner and retained the right to receive the rack-rent, either as owner or as agent or as trustee, and the rights of Driscoll were contractual rights only. Driscoll acquired an option to build houses and to call for leases by the payment of 200*l.* a year, but he did not thereby denude Boyton of the obligation to make the payment now in question. I do not feel pressed by the argument as to hardship, and I come to the conclusion that upon these facts this case is within the decision in *Holland* v. *Kensington Vestry* (1), and that Driscoll was not the person who would be entitled to receive the rack-rent. I think, therefore, that this appeal must be allowed.

WILLS J. I am of the same opinion. Unless there is something which distinguishes this case, it is governed by *Holland* v. *Kensington Vestry*. (1) What is there to distinguish that case? If, in clause 12 of the agreement, the words "or equitable" had been used, this case would have been on all fours with the former case. The Judicature Act has said in effect that an equitable interest is to be on the same footing as a legal interest. There is often a fallacy in that maxim. I understand it thus—that, if an equitable interest is capable, as things then stand, of being turned into a legal interest, then it is the same thing as a legal interest; but not if it is only a matter of contract for something in the future. A good illustration of that is afforded by this very clause in the agreement. Supposing that everything had been done which would entitle Driscoll to have leases granted to him, it could not be said that the clause still operated because no lease had been executed, for Driscoll would have had an immediate right to have leases executed. It seems to me that, in this case, the difficulty is that that is not now the position of Driscoll under this agreement. He is not now entitled to a lease of the plot or of any part of it. Therefore it seems to me that Boyton, having been the owner at the time of the agreement, there is nothing in the agreement to change his ownership, and he still remains the owner and the person who would be entitled to receive the rack-rent. He is the legal and equitable owner as far as the land is concerned.

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(1) L. R. 2 C. P. 565.

CHANNELL J. I agree. There is this point of substance in the view of the learned magistrate—that Boyton by his agreement with Driscoll deprived himself, if the agreement was performed by Driscoll, of any future benefit from the land beyond the sum of 200*l.* a year, and Driscoll would for ninety-nine years get the whole benefit except 200*l.* a year, which is not the rack-rent. Therefore there is much to be said in substance for the view that Driscoll had become the owner of all the interest in the land beyond 200*l.* a year. We have, however, to look at the agreement which was made. It seems to come to this. One man is the owner, and he makes a bargain with the other that, if that other does certain things, when they are done that other shall become the owner. A clause is specially inserted reserving Boyton's rights until those things are done. In those circumstances, is not Boyton still the owner? He has indeed made the bargain with Driscoll; but will that prevent him being the owner? Looking at the definition of "owner" in the Act, I think that it will not do so. The "owner," as defined in the Act, means the "person for the time being receiving the rack-rent . . . . whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." Now here, in consequence of the bargain, the premises could not be let at a rack-rent. If that were so by reason of any statute, these paving expenses would not be payable by any person as owner because the premises would be extra commercium. But the parties cannot bring that about by any contract. In this case there is a bargain which prevents

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the premises being let at a rack-rent, and therefore there arises the difficulty of assuming that a thing can be let when it cannot be let. In my opinion, the last words of the judgment of Willes J. in *Holland* v. *Kensington Vestry* (1) say what is to be done in such a case, and that it does not signify whether the rack-rent would be received as trustee or not. It seems to me that Boyton has by contract given to Driscoll (conditionally on his performing his building contract) all the benefit of ownership of this land, and perhaps he is, subject to that condition, a trustee for Driscoll. But, as between the local authority and the parties, it is Boyton who remains the owner within the principle of the decision in *Holland* v. *Kensington Vestry* (1), because by the contract Boyton is to remain the owner until Driscoll does something which has not yet been done. Therefore it seems to me that Boyton is the person who would receive the rack-rent, although he might receive it only as trustee with an ultimate liability to account for it to Driscoll. After a careful consideration of *Holland* v. *Kensington Vestry* (1) I have come to the conclusion that it cannot be distinguished from the present case, and that the Judicature Act has not made any difference, because Driscoll has not yet done that which he must do in order to entitle him to specific performance of the agreement to grant leases.

Appeal allowed.

Solicitor for appellant: *T. Blanco White.*
Solicitor for respondents: *Paul Caudwell.*

F. O. R.

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(1) L. R. 2 C. P. 565.

C. A.
1903
April 23.

[IN THE COURT OF APPEAL.]

STEVENS *v.* THE GENERAL STEAM NAVIGATION COMPANY, LIMITED.

Employer and Workman—Compensation—"Factory"—Machinery used in loading or unloading Ship—"Harbour"—"Navigable River"—Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38—*Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

By the Interpretation Act, 1889, s. 38, sub-s. 1, "Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

The Factory and Workshop Act, 1901, repeals the Factory Act, 1895, and, so far as the definition of a "factory" is concerned, re-enacts by s. 104 the definition in the former Act with certain additions:—

Held, that the modification mentioned in the Interpretation Act, 1889, includes additions; and that consequently, in the definition of a "factory" in the Workmen's Compensation Act, 1897, the reference to the Factory and Workshop Act, 1895, must be construed as if it were a reference to the provisions of s. 104 of the Factory and Workshop Act, 1901, so as to include in the definition, among other things, machinery used in the process of unloading a ship in a navigable river.

Appeal from an award of the judge of the Southwark County Court under the Workmen's Compensation Act, 1897.

The applicant, who was in the employment of the respondent company, was employed on board their steamship *Nautilus*. The steamer was lying in the river Thames in the fairway, and was discharging a cargo of steel and iron plates into lighters alongside. The applicant was engaged upon this work, which was done by means of the steamer's steam-cranes. While so employed he met with an accident by which he sustained injuries for which he claimed compensation under the Workmen's Compensation Act, 1897.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, "(1.) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, the expression "harbour" includes navigable rivers.

By the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 23, certain provisions of the Factory Acts are to have effect as if "(*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory . . . ."

By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7, "(1.) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . . factory . . . . (2.) 'Factory' . . . . includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895 . . . ."

By the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 161, the Acts specified in the 7th schedule were repealed as from the dates and to the extent in that schedule mentioned, and one of the Acts mentioned in that schedule is the above-mentioned Factory and Workshop Act, 1895, subject to certain exceptions not material in this case.

By s. 104, sub-s. 1, of the same Act, "The provisions of this Act with respect to—

"(i.) Power to make orders as to dangerous machines (section seventeen);

"(ii.) Accidents;

"(iii.) Regulations for dangerous trades;

"(iv.) Powers of inspectors (section one hundred and nineteen); and

"(v.) Fines in case of death or injury (section one hundred and thirty-six),

shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process; . . . .

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"(2.) For the purposes of this section . . . . the expressions 'ship' and 'harbour' have the same meaning as in the Merchant Shipping Act, 1894."

The county court judge held that by reason of the Interpretation Act, 1889, and the other Acts above noted, machinery used in the process of unloading a ship in a navigable river came within the expression 'factory' in the Workmen's Compensation Act, 1897, and made an award in favour of the applicant.

The respondent company appealed.

Carver, K.C., and *Maurice Hill*, for the company. The word "harbour" is not found in the Factory and Workshop Act, 1895, and did not come within the definition of a factory in the Workmen's Compensation Act, 1897, at the time it was passed. The Factory and Workshop Act, 1901, consolidated and amended the previous Factory Acts, re-enacting most of the existing provisions, and applying them to new classes of persons and subjects. It is in this respect a new enactment, and the definitions contained in it cannot be read into the previous Acts. The definitions of the old Acts are incorporated in and still have effect in interpreting the Workmen's Compensation Act, 1897, in the same way that an appeal given by reference to certain sections of prior Acts was held to remain in spite of the repeal of those sections: *Reg.* v. *Smith.* (1) The Interpretation Act, 1889, does not apply to such a case as the present, for it deals with modification of Acts, and not with the extension of their scope. Such an alteration of the class of persons affected and extension of the subject-matter of previous Factory Acts as is found in the Factory and Workshop Act, 1901, cannot properly be called a modification of the provision of the previous Acts.

G. Thorn Drury, for the applicant, was not called on.

COLLINS M.R. In my opinion this appeal fails. The express words of the Interpretation Act, 1889, s. 38, sub-s. 1, seem to me to conclude the matter. They say that where an Act passed after that date "repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted." We have in the case before us the general Act of 1901, which repeals and re-enacts with modifications the Factory Acts of previous years. Unless it can be said that the provisions of s. 104 of the Act of 1901, the effect of which is to include in the word "factory" all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal, cannot be described as a modification of the repealed s. 23 of the Factory and Workshop Act, 1895, it must be conceded that by reason of the Interpretation Act the provisions of the Act of 1901 have been incorporated in the definition of a factory in the Workmen's Compensation Act. Is then the introduction of the word "harbour" so radical an alteration of the previously existing section as not to fall within the term "modification"? Modification implies an alteration, and it seems to me to be as much a modification of that which previously existed that the word harbour should be added as if a limitation had been imposed by the removal of a word from the definition. The ship in this case was unloading in a river and not in a dock, and on the legislation as it existed before the Workmen's Compensation Act it would not have fallen within the scope of that Act. Then came the change introduced by the Act of 1901, and, having regard to the terms of that Act, I cannot doubt that it was introduced for the purpose of amending the Workmen's Compensation Act. The Legislature must be taken to have been fully acquainted with the provisions of that Act which have reference to the Factory Acts and with the decisions thereon, and the Act of 1901 seems to me to have been passed with the intention of altering the existing state of things by a modification of the Factory Act of 1895. This intention the Interpretation Act, 1889, enabled the Legislature to carry out in the way in which it has been carried out, for in my opinion there is no reason to limit the word "modification," which is

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(1) (1873) L. R. 8 Q. B. 146.

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equally applicable whether the effect of the alteration is to narrow or to enlarge the provisions of the former Act. The appeal, therefore, must be dismissed.

STIRLING L.J. I am of the same opinion. By the Workmen's Compensation Act, 1897, a factory includes machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. It is admitted that the present case does not fall within the provisions of s. 23 of that Act. That Act, however, has been repealed by the Factory and Workshop Act, 1901, and in lieu of it there has been re-enacted a similar section applicable to the unloading of a ship in a harbour, and in the word harbour a navigable river is included. It is admitted that the machinery in the present case comes within that section. The question that we have to consider is what is the effect of s. 38 of the Interpretation Act, 1889, which provides, so far as it is applicable to the present case, that where after the commencement of the Act any Act "repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted." We have in the Workmen's Compensation Act, 1897, references to the provisions of the Factory and Workshop Act, 1895, and those references, unless the contrary intention appears, must now be construed as references to the provisions re-enacted by the Act of 1901—that is, re-enacted with or without modification. The original and the re-enacted clauses need not be identical, and the sole question is whether when the modification takes the form of extending and not narrowing the former provisions it amounts to a modification within the meaning of the Interpretation Act. I can see no reason for holding that an alteration such as that with which we are dealing in the present case is not such a modification as was contemplated. In these days the passing of Acts modifying existing statutes is not infrequent, and the draftsman is entitled to rely on the Interpretation Act.

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Stirling L.J.

MATHEW L.J. I am of the same opinion. It is suggested that the definition of factory in the Workmen's Compensation Act, 1897, must be confined to the factories defined in the Factory and Workshop Acts then in force. Sect. 104 of the Factory and Workshop Act adds to the enumerated places that are included in the term "factory" the word "harbour." This appears to me to be a clear modification of the repealed and re-enacted Factory and Workshop Act, 1895, and the decision of the learned county court judge must be supported.

Appeal dismissed.

Solicitors for applicant: *H. Clifford Turner & Co.*
Solicitor for respondents: *William Batham.*

A. M.

COMMISSIONER OF POLICE, APPELLANT *v.* DONOVAN, RESPONDENT.

1903
April 6.

Justices—Evidence—Previous Conviction—Register of Convictions in Court of Summary Jurisdiction—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* *c.* 49), *s.* 22—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict.* *c.* 43), *s.* 14—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict.* *c.* 112), *s.* 18—*Jurisdiction—Conviction for Drunkenness—Notice to Police—Consent of Defendant—Inebriates Act*, 1898 (61 & 62 *Vict.* *c.* 60), *s.* 2, *sub-s.* 1—*Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 6, *sub-s.* 1.

The register of the minutes or memorandum of convictions of a Court of summary jurisdiction which has to be kept under s. 22 of the Summary Jurisdiction Act, 1879, by the clerk of the Court is admissible in evidence to prove a previous conviction of the defendant for a similar offence in the same Court.

The consent of the defendant to be tried summarily under s. 2 of the Inebriates Act, 1898, is necessary before a magistrate can make an order under s. 6, sub-s. 1, of the Licensing Act, 1902.

CASE stated by the chief magistrate of the metropolis, sitting at Bow Street Police Court.

On January 7, 1903, the respondent was charged at Bow Street by the appellant with being guilty while drunk of riotous and disorderly behaviour in a highway on January 6, 1903, one of the offences mentioned in the 1st schedule to the Inebriates

Act, 1898. The charge was proved, and the appellant requested the magistrate to make an order under s. 6, sub-s. 1, of the Licensing Act, 1902. (1)

There is kept at Bow Street Police Court a register as prescribed by s. 22 of the Summary Jurisdiction Act, 1879 (2), in the form and containing the particulars directed by the Summary Jurisdiction Rules, 1886. The register was tendered in evidence by the appellant, and attention called to entries shewing that a person, identified as the respondent, had been convicted at Bow Street on a charge of being drunk and disorderly (an offence within the 1st schedule of the Inebriates Act, 1898) on three occasions within the twelve months preceding the date of the present offence.

(1) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 6, sub-s. 1: "Where, upon conviction of an offender, the Court is satisfied that an order of detention could be made under s. 1 or s. 2 of the Inebriates Act, 1898, then, whether an order of detention is made or not, the Court shall order that notice of the conviction, with such particulars as may be prescribed by a Secretary of State, be sent to the police authority (within the meaning of the Police Act, 1890) for the police area in which the Court is situate."

Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 2, sub-s. 1: "Any person who commits any of the offences mentioned in the 1st schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him."

(2) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22: "(1.) The clerk of every Court of summary jurisdiction shall keep a register of the minutes or memorandum of all the convictions and orders of such Court, and of such other proceedings as are directed by a rule under this Act to be registered, and shall keep the same with such particulars and in such form as may be from time to time directed by a rule under this Act.

"(2.) Such register and also any extract from such register certified by the clerk of the Court keeping the same to be a true extract shall be primâ facie evidence of the matters entered therein for the purpose of informing a Court of summary jurisdiction acting for the same county, borough, or place as the Court whose convictions, orders, and proceedings are entered in the register; but nothing in this section shall dispense with the legal proof of a previous conviction for an offence when required to be proved against a person charged with another offence."

It is not the practice of the metropolitan police courts to draw up and lodge a conviction, as provided by s. 14 of the Summary Jurisdiction Act, 1848 (1), except in those cases in which the drawing up of a formal conviction for some special reason is asked for or required.

In the drawing up of a conviction under s. 14 of the Summary Jurisdiction Act, 1848, or of a copy of a conviction under s. 18 of the Prevention of Crimes Act, 1871 (2), the essential materials—(i.) date of conviction; (ii.) offence charged; (iii.) name of person convicted—are taken from the register, which is in these respects the basis of the formal document. Details as to time when and place where the offence was committed would be supplied from the entries in a note-book made in Court by the magistrate's clerk at the time the evidence is taken.

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(1) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14: ". . . . and the said justice or justices, having heard what each party shall have to say as aforesaid, and the witnesses and evidence so adduced, shall consider the whole matter, and determine the same, and shall convict or make an order upon the defendant, or dismiss the information or complaint, as the case may be; and if he or they convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the said justice or justices in proper form, under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace to be by him filed among the records of the general quarter sessions of the peace . . . ."

(2) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18: "A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

"A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the clerk or other officer of any Court to which such conviction has been returned . . . . The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction."

It was contended by the appellant that the production of the register and the evidence of identification was sufficient evidence at common law or under s. 22 of the Summary Jurisdiction Act, 1879, to enable the magistrate to be satisfied of the three convictions mentioned in the register and of the fact that the respondent was an habitual drunkard within the meaning of s. 2 of the Inebriates Act, 1898, so that, if the other requirements of the section were fulfilled, an order of detention could be made under that section, and that therefore the magistrate could, and ought to, make an order under s. 6, sub-s. 1, of the Licensing Act, 1902.

It was also contended by the appellant that upon the language of s. 6, sub-s. 1, of the Licensing Act, 1902, formal and strict proof of the convictions was unnecessary, and that the register was admissible for the purpose of informing the mind of the Court in exercising jurisdiction under the section.

The appellant also contended that the consent of the respondent to be dealt with summarily by the magistrate was not necessary for the exercise of any jurisdiction under the Licensing Act, 1902, s. 6, sub-s. 1.

The magistrate was of opinion that before sending the notice of the conviction to the police authority it was necessary that he should be satisfied (1.) that the respondent was an habitual drunkard; (2.) that the respondent within twelve months preceding January 6, 1903, had been convicted at least three times of one or more of the offences mentioned in Sched. I. of the Inebriates Act, 1898.

Subject to the question of law raised by the case, the magistrate was in fact satisfied that these conditions had been fulfilled, and that an order of detention could be made under the Inebriates Act, 1898, s. 2, sub-s. 1.

The magistrate was further of opinion that the previous convictions required to be formally proved, and could only be proved (*a*) by production of the record of the conviction or an examined copy of it: see *Hartley* v. *Hindmarsh* (1); or (*b*) by a copy of the conviction signed as provided by s. 18 of the Prevention of Crimes Act, 1871. The magistrate was also of opinion that the respondent's consent to be dealt with summarily was a condition precedent to the exercise of his jurisdiction under s. 6, sub-s. 1, of the Licensing Act, 1902.

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(1) (1866) L. R. 1 C. P. 553.

The magistrate accordingly overruled the contentions of the appellant and declined to make the order asked for, and postponed passing sentence upon the respondent pending the decision of this case.

The questions of law for the opinion of the Court were—(1.) whether the previous convictions must be proved for the purposes of s. 6, sub-s. 1, of the Licensing Act, 1902, in one or other of the modes before referred to, or, if not, in what manner such previous convictions should or might be proved; (2.) whether the consent of the respondent to be dealt with summarily was a condition precedent to the exercise of the magistrate's jurisdiction under s. 6, sub-s. 1, of the Licensing Act, 1902.

Danckwerts, K.C., and *A. Gill*, for the appellant. The magistrate was wrong in holding that the previous convictions could only be proved by producing the record of the conviction drawn up under s. 14 of the Summary Jurisdiction Act, 1848, or by a copy of the conviction signed as provided by s. 18 of the Prevention of Crimes Act, 1871. Both at common law and under s. 22 of the Summary Jurisdiction Act, 1879, the register kept under that section is evidence of a previous conviction within the same jurisdiction: *Rex* v. *Hains* (1); Taylor on Evidence, 9th ed. ss. 1571, 1572; Starkie on Evidence, 3rd ed. p. 303; and it is immaterial that in the present case the previous convictions were not all by the same magistrate. Any Court may look at and act upon its own minutes without the formal record being brought up, and where the record is not drawn up the practice is to read the minutes: see *Reg.* v. *Horne Tooke* (2), per Eyre L.C.J. In Courts of summary jurisdiction which are not Courts of record it has never been necessary to produce the record of the conviction, and in the

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(1) (1695) Comb. 337.

(2) (1794) 25 St. Tr. at p. 447.

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metropolitan police courts it is not the practice to follow the procedure laid down by s. 14 of the Act of 1848 with regard to the drawing up and filing of a record of a conviction. The only object of sending the record to quarter sessions is to enable the Crown to enforce penalties and forfeitures. Sect. 22 of the Act of 1879 requires every Court of summary jurisdiction to keep a register of its convictions, which is to be primâ facie evidence of the matters entered therein, and unless the register can be used as evidence in a case like the present it is difficult to see what purpose is served by keeping it. In *London School Board* v. *Harvey* (1) it was held that an order of a Court of summary jurisdiction under the Elementary Education Act, 1876, imposing a penalty on a parent for non-compliance with a previous order for the attendance of his child at school, might be proved in subsequent proceedings in the same Court by the minute-book of the Court, kept pursuant to 2 & 3 Vict. c. 71, s. 44, containing an entry of the order. That case is conclusive authority in favour of the appellant. In *Hartley* v. *Hindmarsh* (2), which was relied on by the magistrate, this question did not really arise, as the Court held that there had been no conviction; moreover, that case was decided before the Summary Jurisdiction Act, 1879. Sect. 18 of the Prevention of Crimes Act, 1871, is not opposed to the appellant's contention, because that section expressly reserves any other authorized mode of proving a previous conviction.

[*Reg.* v. *Inhabitants of Yeoveley* (3); *Doe* d. *Bassett* v. *Mew* (4); *Rex* v. *Parry* (5); *Reg.* v. *Newman* (6); *Reg.* v. *Hutchins* (7); *Mellor* v. *Denham* (8); *Fisher* v. *Lane* (9); *Dyson* v. *Wood* (10); *Giles* v. *Siney* (11); *R.* v. *Eaton* (12), were also cited.]

The second question is whether the consent of the respondent to be dealt with summarily was a condition precedent to the exercise by the magistrate of his jurisdiction under s. 6, sub-s. 1, of the Licensing Act, 1902. It is submitted that it is not. Sect. 2, sub-s. 1, of the Inebriates Act, 1898, created a new class of offence, which might be dealt with either by indictment, or summarily if the defendant consented. Then s. 6, sub-s. 1, of the Licensing Act, 1902, provides that, where upon the conviction of an offender the Court is satisfied that an order of detention could be made under s. 1 or s. 2 of the Act of 1898, then certain consequences are to follow. The words "where upon the conviction of an offender" are not confined to a charge under the Act of 1898, in which case the defendant's consent is necessary for the case to be dealt with summarily, but apply to a conviction on any charge if the circumstances are such that, if proceedings had been taken under the Act of 1898, an order of detention could have been made. The consent of the respondent was, therefore, not a condition precedent to the making of an order under s. 6, sub-s. 1, of the Act of 1902.

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(1) (1879) 4 Q. B. D. 451.

(2) L. R. 1 C. P. 553.

(3) (1838) 8 A. & E. 806.

(4) (1837) 7 A. & E. 240.

(5) (1837) 7 C. & P. 836.

(6) (1852) 2 Den. C. C. 390.

(7) (1880) 5 Q. B. D. 353.

(8) (1880) 5 Q. B. D. 467.

(9) (1772) 2 W. Bl. 834.

(10) (1824) 3 B. & C. 449.

(11) (1864) 13 W. R. 92.

(12) (1787) 2 T. R. 285.

H. Sutton was heard by leave on behalf of the magistrate on the first point. The decision of the magistrate was right. A previous conviction can only be proved in one or other of the ways stated in the case. The minute or memorandum made under s. 14 of the Summary Jurisdiction Act, 1848, and the register kept under s. 22 of the Act of 1879, do not contain all the essential information requisite in a conviction, for in neither case is there any statement as to the time and place of the offence. But if the record filed at quarter sessions were produced that information would be supplied. Formerly, the only way of proving a previous conviction was to produce the record itself: *Rex* v. *Smith*. (1) Then by 14 & 15 Vict. c. 99, s. 13, in the case of indictable offences a certified copy was made admissible in evidence. This method of proof was by 24 & 25 Vict. c. 96, s. 116, extended to summary convictions for larceny. Finally, the Prevention of Crimes Act, 1871, s. 18, provides a code, dealing with all classes of previous convictions. Sect. 22 of the Act of 1879 does not deal with the question of the proof of a previous conviction. It merely enacts that the register shall be primâ facie evidence for the purpose of "informing" the Court, and the latter part of the section supports this view. *London School Board* v. *Harvey* (1) is not in point, for that was not a case of a conviction, but of an order. [He referred to Paley on Summary Convictions, 7th ed. p. 439.]

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(1) (1828) 8 B. & C. 341.

Danckwerts, K.C., in reply. None of the statutory enactments is exclusive of the common law rule as to what is admissible in evidence to prove a previous conviction.

LORD ALVERSTONE C.J. Both points raised in this case are points of importance, but I doubt whether a decision upon the first point in favour of Mr. Danckwerts will have any far-reaching effect, because my present opinion is that the use of the register for the purpose of proving a previous conviction must be confined to the Court in which the previous conviction took place. The point is whether the magistrate sitting at Bow Street Police Court, when dealing with a case under s. 6 of the Licensing Act, 1902, may, for the purpose of enforcing that section, refer to and act upon the minute and memorandum which is directed to be made under s. 14 of the Summary Jurisdiction Act, 1848, or the register of the minute or memorandum which has to be kept under s. 22 of the Summary Jurisdiction Act, 1879.

Now it seems to me, to a large extent for the reasons urged by Mr. Danckwerts, that a magistrate is entitled to act upon the information contained in the minute or memorandum made in the Court in which he is sitting, and also contained in the register kept in that Court. [His Lordship read s. 14 of the Summary Jurisdiction Act, 1848.] I have no doubt that it was considered desirable by the Legislature that a record of convictions in inferior Courts should be filed at quarter sessions and kept there for future use in certain circumstances; but I think that the minute or memorandum which is by s. 14 to be drawn up at the time of the conviction and the use of which by a party to the proceedings is apparently contemplated because the section says that no fee is to be paid for it, was intended to be a document of a formal character to which reference might be made if necessary. I think the intention was that the minute was to be a record of the proceedings of the Court of summary jurisdiction, and by s. 22 of the Act of 1879 the register of the minutes which is to be kept in a Court of summary jurisdiction is made primâ facie evidence of the matters entered therein for the purpose of informing the Courts referred to in the section. That enactment certainly tends to shew that the minutes are to have more effect than a mere record made at the time which is not to be used afterwards. Our attention has been called by Mr. Sutton to s. 18 of the Prevention of Crimes Act, 1871, and it may be that, where a previous conviction, whether it be an indictment or summary, has to be proved in other Courts or for other purposes, that section requires more to be done than the production of the minute made under s. 14 of the Act of 1848, or the register kept under s. 22 of the Act of 1879. With regard to the information which would be disclosed by the register that is regulated by the Act and by the rules, and it is to be observed that the register in this case contains the date of the conviction, the offence charged, and the name of the person convicted, so that for the purpose for which the magistrate has to refer to it, it contains the same information as would be supplied by a certified copy of the conviction or of the record of the minute made under s. 14 of the Act of 1848. The case of the *London School Board* v. *Harvey* (1) is an authority in favour of the appellant's contention. There the respondent was summoned for non-compliance with an order for the attendance of his child at school and was fined. He was subsequently charged on a summons with a second non-compliance with the order, and it was sought to prove the previous non-compliance with the order and the infliction of the fine by producing a book containing a memorandum which was to the same effect as the register in the present case, and which was kept under a statute containing a provision similar to that in s. 14 of the Act of 1848. Cockburn C.J. and Lopes J., acting on the old common law authorities, held that that memorandum could be referred to for the purpose of proving the previous conviction. I cannot see that any mischief will result from following that decision; on the contrary, I think that there will be substantial gain. It is said that it is not the practice in the police courts of the metropolis to draw up the formal record of a conviction, and although it may be that some statutory duty may not have been observed, yet it seems a strong thing to say that, in a case like the present, a magistrate, sitting in the same Court as that in which the previous conviction has taken place, must hold his hand unless a certified copy of the conviction is obtained and put in evidence. I therefore come to the conclusion on the first question raised by this case that the magistrate was entitled to act in his Court upon the memorandum or minute of a conviction made under s. 14 of the Act of 1848, or upon the register kept under s. 22 of the Act of 1879.

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(1) 4 Q. B. D. 451.

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(1) 4 Q. B. D. 451.

The second question is whether a magistrate has power to make the order referred to in s. 6, sub-s. 1, of the Licensing Act, 1902, without the consent of the defendant to be dealt with summarily. It has been contended that the words "where, upon the conviction of an offender, the Court is satisfied," &c., in s. 6, sub-s. 1, include a conviction for any offence whatever. The statute might have said that; but, when one comes to look at the language of the section and the previous legislation, it seems to me that that is not the object of the section, or what the Legislature intended by this enactment. Sect. 1 of the Inebriates Act, 1898, provided that where a person is convicted on an indictment and the Court is satisfied that the offence was committed under the influence of drink, and the offender admits, or it is proved, that he is an habitual drunkard, an order for his detention may be made.

Then by s. 2, sub-s. 1, it is provided: [His Lordship read the section.] Now what is the practical operation of that sub-section? A person is being tried summarily for one of the offences mentioned in the schedule, which are all cases of persons doing certain things under the influence of drink, and in the course of the proceedings it appears from the evidence that, in addition to being a person who has committed one of the offences specified in the schedule, he also comes within the category of persons referred to in s. 2, sub-s. 1. What follows? "If he consents to be dealt with summarily on summary conviction" he may be detained for a term of years in a reformatory. But if he does not consent to be dealt with summarily, then he will have to be tried on indictment, and he comes within the category of persons who are dealt with in s. 1. Now it is with reference to that state of things that s. 6 of the Licensing Act, 1902, is dealing. The section says: "Where, upon the conviction of an offender, the Court is satisfied that an order of detention could be made under s. 1 or s. 2 of the Inebriates Act, 1898, then, whether an order of detention is made or not, the Court shall order," &c. We have been pressed to say that, having regard to the object of the section, it means that, assuming the circumstances are such that, if the proceedings had been under the Act of 1898, an order could with the consent of the defendant have been made summarily, the magistrate may make the order referred to in s. 6 of the Act of 1902 whether the defendant consents or not. In my opinion that is not the meaning of the section. I think it means that the magistrate can only make an order for the notice to be sent to the police authorities if the circumstances are such that he would have jurisdiction to make a summary order for detention under s. 2 of the Act of 1898—that is to say, there must be the consent of the defendant to be tried summarily. The intention was in my opinion that, in addition to the power which a magistrate has of making an order under s. 2 of the Act of 1898, he shall make the order referred to in s. 6 of the Act of 1902 as to giving notice to the police, whether or not an order for detention is in fact made. I think that to adopt the contention of the appellant would be to read into s. 6 words which are not there, and which would have the effect of giving to the section a meaning contrary to the intention of the Legislature. In my opinion the learned magistrate was right in holding that he had no power to make an order under s. 6 of the Act of 1902 unless the defendant consented to be tried by him summarily.

WILLS J. I am of the same opinion on both points. With regard to the first question, some of the authorities cited by Mr. Danckwerts shew that a distinction has been drawn between the use to be made of what I may call incomplete or informal records of a Court, according to whether it is proposed to use them in the same Court or not, and that idea seems to have been carried out in s. 18 of the Act of 1871. It is true that that section says that nothing therein shall dispense with the legal proof of previous convictions, but there is also at the end of the section the provision that any method of proof which was theretofore legal should remain legal, and therefore, if the method of proof contended for by the appellant was by the common law allowed to be made use of by the same Court which passed the original judgment, the common law has been satisfied in this case. It does not appear to me that there is any question of substance involved, excepting, possibly, as Mr. Sutton has suggested, that if the conviction was formally drawn up it would shew the time and place at which the offence was committed. It is to be observed, however, that the time and place at which the original offence was committed are not got from the records which are directed to be kept under the Summary Jurisdiction Acts; for paragraph 8 of the case states that they are to be obtained from entries in the note-book of the magistrate's clerk, made at the time the evidence is taken, which is a book not required to be kept at all or to be preserved, and inasmuch as the time and place could only be got from such an informal source as that, it does not look as if time and place were of the essence of that which is to be preserved by the record of a conviction. I think, therefore, this is a case in which the common law doctrine applies, and, the previous convictions having been in the same Court, the Court had the right to resort to them.

With regard to the second question, I confess I have not been able to entertain from the first any real doubt as to the meaning of s. 6, sub-s. 1, of the Licensing Act, 1902. It seems to me to say, as plainly as language can say, that whereas by the Inebriates Act of 1898, where the Court upon a proper conviction of the offender, whether under the provisions of the

1st or 2nd section, has the power of saying either that he shall be detained or not, then, whether the Court does pronounce that addition to the sentence or does not, notice is to be given to the police. That construction seems to me to give the natural meaning to the language of the section, which, I think, merely provides a supplement to the consequences which will follow a conviction either under indictment, or on summary conviction if the defendant consents to be dealt with in that fashion.

CHANNELL J. I concur on both points. As to the first point, I do not think myself it is a point of very great practical importance, and I do not think there would be serious difficulty in proving the conviction by a formal record of the conviction; but I concur on this point on the ground of the authority of the *London School Board* v. *Harvey* (1); but for that I should have had considerable doubt on the point, and am not sure which way I should have decided.

As to the second point, I think it is clear; but I think it wants a little explanation. The Inebriates Act, 1898, has two sections, each providing for an order for detention, and under each there is both matter of substance to be proved and matter of procedure to be adopted and followed. Under s. 1 it is to be proved that the offence in question was committed under the influence of drink, or that drunkenness was a contributory cause to the offence, and that the defendant is an habitual drunkard. Those are matters of substance. The procedure to be adopted is that those matters must be charged in the indictment, and that, unless evidence has been given before the committing magistrate of it, seven days' notice of the evidence must be given. That is the procedure. Then, under the 2nd section, the matter of substance to be dealt with is that the offence under consideration at the time is one of those scheduled to the Act, which means that it must be an offence arising out of drunkenness. Next, there must have been at least three convictions of that character; and then again, as under s. 1, the person must be shewn to be an habitual drunkard. Those are the matters of substance which have to be shewn in order that an order for detention may be made. The procedure is that the man shall be committed for trial on the offence, or shall consent to be dealt with summarily. Then, when you come to s. 6 of the Licensing Act of 1902, it says, "Where, upon the conviction of an offender, the Court is satisfied that an order of detention could be made under s. 1 or s. 2 of the Inebriates Act, 1898." I think that means, where an order of detention could be made, not only because the facts of substance are proved, but also because the proper machinery has been adopted, and that, unless the proper procedure under s. 1 or s. 2 of the Act of 1898, as the case may be, has been in fact followed, then in that case no order could be made for detention; and if no order could be made for detention, then the order for notice to be given to the police, referred to in s. 6, also cannot be made. It seems to me that the fact that the words which are used, namely, "is satisfied that an order for detention could be made whether an order for detention is made or not," are words in the present tense, and not in the past, really concludes the matter.

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(1) 4 Q. B. D. 451.

Appeal dismissed.

Solicitors: *Wontner & Sons; Solicitor to the Treasury.*

F. O. R.

END OF VOL. I.

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ARBITRATION — *Staying Proceedings* — "*Submission*"—*Agreement to refer Disputes to Foreign Court*—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 27.

A policy of life insurance was effected by a foreigner with an English insurance company, which had a branch office at Budapest. The policy, which was in the French language, provided that the premiums and insurance money should be payable at Budapest, and contained a condition, of which the English translation was as follows: "For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters":—

Held, that the above-mentioned condition constituted a "submission" within the meaning of s. 4 of the Arbitration Act, 1889. AUSTRIAN LLOYD STEAMSHIP COMPANY *v.* GRESHAM LIFE ASSURANCE SOCIETY, LIMITED - **C. A.** 249

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ARCHITECT—*Damages*—*Negligence of Architect in preparing Plans*—*Plans not used*—*Nominal Damages.*

The plaintiffs employed the defendant to prepare plans for a building to be erected on a site belonging to them. The defendant neglected to measure the site, and, acting on information which was unauthorized by the plaintiffs, prepared plans on the assumption that the site was smaller than it was in fact. The plaintiffs, having paid the defendant for the plans, were unable to raise funds to build on the site, and ultimately parted with it, and then discovered the error in the plans. In an action to recover the money paid for the plans on the ground of a total failure of consideration, or, in the alternative, for damages for negligence:—

Held, that there had not been a total failure of consideration, but that as the defendant had been negligent the plaintiffs were entitled to damages, although, as they had sustained no loss from his negligence, those damages would be only nominal. COLUMBUS COMPANY *v.* CLOWES **Wright J.** 244

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AUCTIONEER—*Advertising Property for Sale*—*Action by Person claiming to be Owner*—*Slander of Title*—*Auctioneer cast in Damages*—*Liability of Principal.*

The defendants instructed the plaintiff, an auctioneer carrying on business in Paris, to advertise for sale a mare which they represented to him was a thoroughbred mare entered and described in the English Stud Book under the name of Pentecost. The plaintiff accordingly advertised the mare for sale as so named and described. A Frenchman, the owner of a thoroughbred mare also called Pentecost, brought an action in France against the plaintiff, alleging that he had suffered damage through the defendants' mare being advertised for sale under that name, and recovered damages. In an action by the plaintiff against the defendants for an indemnity, it was found as a fact that the representation made by the defendants as to the identity of their mare was true:—

Held, that the defendants were not liable, the damages recovered from the plaintiff not being due to any wrongful act on their part. HALBRONN *v.* INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED - - - - **Bruce J.** 270

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BANKRUPTCY—*Annulment*—*Discretion of Court* —*Conduct of Bankrupt*—*Interests of Public and of Commercial Morality*—*Proposal of Composition after Discharge of Bankrupt*—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 23, 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 9.

The creditors of a bankrupt, whose discharge had been suspended for two and a half years, after the period of suspension had expired resolved by the proper majority to entertain, under the provisions of s. 23 of the Bankruptcy Act, 1883, a proposal by the bankrupt to pay a composition of 7*s.* 11*d.* in the pound in addition to a dividend of 2*s.* 1*d.* in the pound which had been paid in the bankruptcy, on condition that the bankruptcy should be annulled:—

Held, that, in the exercise of its discretion under s. 23 as to the approval of the scheme, the Court ought to consider, not only the interest of the creditors, but also the interests of the public and of commercial morality, and that, having regard to the facts found by the official receiver in his report on the bankrupt's application for his discharge, the bankruptcy ought not to be annulled.

The Court accordingly refused to approve of the scheme. *In re* BEER. *Ex parte* BEER **C. A.** 628

BANKRUPTCY—*continued.*

2. —— *Bankruptcy Notice—Security given to Satisfaction of Creditor—Right of Creditor to issue fresh Bankruptcy Notice—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice was on January 22, 1902, served by a judgment creditor for 2129*l.* on the debtor. On January 28 an agreement was entered into between the creditor and the debtor that the latter should pay 75*l.* in cash to the creditor, and hand over to him a specified bill of exchange for 400*l.*, payable two months after January 18. The debtor also undertook to have transferred to the creditor 4000 fully paid-up shares in a specified company, with liberty to the debtor to repurchase the shares on or before January 28, 1903, at the amount of the judgment debt and taxed costs, with interest thereon. This was "to be security for the debt, but judgment still to be in full force." The 75*l.* was paid, and the bill of exchange was handed over to the creditor, and on January 29 an order setting aside the bankruptcy notice was made by consent. The defendant duly carried out his undertaking:—

Held, that, security for the debt to the satisfaction of the creditor having been given within seven days after service of the notice, the requirements of the notice had been complied with, and that, the debtor not having committed any default, the creditor was not entitled during the pendency of the security to serve the debtor with a fresh bankruptcy notice in respect of the same debt. *In re* SMITH. *Ex parte* DURBAN - - - - - C. A. 33

3. —— "*Costs of Petitioning Creditor*"—*Costs of rehearing Petition*—"*Actual Expenses incurred in realizing Assets*"—*Trustee's Solicitors' Costs—Priorities—Locus Standi of Solicitor—Practice—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 57—*Bankruptcy Rules,* 1886, *rr.* 125, 183.

By rule 125 of the Bankruptcy Rules, 1886, the assets remaining, after payment of the actual expenses incurred in realizing any of the assets of the debtor, are liable, subject to any order of the Court, to the payment of—first, the taxed costs of the petitioning creditor; secondly, the trustee's necessary disbursements other than the actual expenses of realization heretofore provided for; and, thirdly, the costs of any person properly employed by the trustee:—

Held, that the actual expenses of realizing the assets mean strictly the costs of a sale of any of the assets, and do not extend to the trustee's solicitors' bill of costs:

Held, also, that the "taxed costs of the petitioning creditor" include as a rule the costs of a rehearing by the registrar and the Court of Appeal.

Where more than a year elapsed between the date of a receiving order and an application for a rehearing, and in the meantime the trustee had incurred considerable costs in tracing and getting in the bankrupt's assets and in successful litigation for that purpose, and the assets were insufficient to pay in full the bill of costs of the solicitors properly employed by the trustee in the above matters, and also the petitioning creditor's costs of the rehearing in the Court below and on appeal:—

Held, that no sufficient reason was shewn for varying the order of priorities prescribed by the rule.

Quære, whether a solicitor properly employed by a trustee in bankruptcy can apply direct to the Court for payment of his bill of costs out of the estate, or whether he must apply for leave to use the name of the trustee for that purpose. *In re* BRIGHT. *Ex parte* WINGFIELD & BLEW **Wright J. 735**

4. —— *Execution Creditor—Sheriff's Fees—Possession Money—Possession by Sheriff for more than Twenty-one Days—Act of Bankruptcy*—"*Costs of Execution*"—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *ss.* 1, 11, *sub-s.* 1.

On March 12, 1902, the sheriff levied under a fi. fa. on the goods of a debtor, and, at the request of the execution creditor and of the debtor, remained in possession. On April 3 the debtor committed an act of bankruptcy by the sheriff having been in possession for twenty-one days. On May 16 a receiving order was made against the debtor whereby the title of the trustee in bankruptcy related back to April 3. The sheriff withdrew on May 29:—

Held, that the sheriff's possession money for the period beyond April 3 was not "costs of the execution" within s. 11 of the Bankruptcy Act, 1890, as against the trustee in bankruptcy. *In re* ENGLISH & AYLING. *Ex parte* MURRAY & Co. **Wright J. 680**

5. —— *Proof—Trustee—Breach of Trust—Unauthorized Investment—Contributory Mortgage—Bankruptcy of Trustee—Proof against Bankrupt's Estate—Valuing Security—Measure of Damages—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 168, *and Sched. II., rr.* 9–16.

L., a trustee, advanced trust funds on a contributory mortgage, which was an unauthorized investment. He afterwards became bankrupt. The mortgagor commenced an action against L., and all others claiming through or under him, to set aside the mortgage on the ground of fraud. L.'s cestuis que trust compromised their claims in the action without the concurrence of L.'s trustee in bankruptcy:—

Held, that, as L.'s cestuis que trust had adopted the improper investment, they could not under the circumstances prove in L.'s bankruptcy for the whole amount of the trust fund, but that their remedy was a proof for the damages the trust estate had sustained by reason of the improper investment, and that the measure of damages was the difference between the total sum invested and the assessed value of the amount receivable under the compromise.

The dictum of Kekewich J. in *In re Salmon*, (1889) 42 Ch. D. 356–8, as to the relative rights of trustee and cestui que trust, where the trustee makes an improper investment, applied. *In re* LAKE. *Ex parte* HOWE TRUSTEES **Wright J. 439**

6. —— *Receiving Order—Debt to Moneylender*—"*Harsh and Unconscionable Transaction*"—"*Excessive Interest*"—*Power of Court to reopen*

BANKRUPTCY—*continued.*

Transaction—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-ss.* 1, 3.

Under s. 1 of the Money-lenders Act, 1900, a transaction with a money-lender can be reopened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not "such that a Court of Equity would have given relief" before the Act.

Decision of Ridley J. in *Wilton & Co.* v. *Osborn*, [1901] 2 K. B. 110, disapproved.

This power to give relief can be exercised by the Court of Bankruptcy upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which the debtor did not apply for relief under s. 1.

Semble, that the interest charged upon a loan may be so excessive as of itself to render the transaction "harsh and unconscionable." *In re* A DEBTOR. *Ex parte* THE DEBTOR - **C. A. 705**

7. —— *Receiving Order—Scheme of Arrangement — Provable Debt carrying Interest above 5 per cent. — Dividend — Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-s.* 9; *s.* 23.

It is competent for a debtor in carrying in a scheme of arrangement under s. 3 of the Bankruptcy Act, 1890, with the consent of his creditors and the approval of the Court, to exclude the application of s. 23 of the Act. *In re* NEPEAN. *Ex parte* RAMCHUND - - **Wright J. 794**

8. —— *Undischarged Bankrupt — After-acquired Property—Contract of Employment made before Bankruptcy — Breach of Contract after Bankruptcy—Right of Bankrupt to sue—Intervention of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

An undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action.

Judgment of Phillimore J., [1902] 2 K. B. 397, affirmed. BAILEY *v.* THURSTON & Co. **C. A. 137**

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BASTARDY — *Jurisdiction of Justices — Illegitimate Child "chargeable" to Parish — Cost of Relief — Marriage of Mother — Application by Guardians against Putative Father, where Husband able to maintain Child—Poor Law Amendment Act*, 1834 (4 & 5 *Will.* 4, *c.* 76), *s.* 57—*Bastardy Laws Amendment Act*, 1873 (36 & 37 *Vict. c.* 9), *s.* 5.

Where an illegitimate child is being maintained by the guardians of a union or parish, justices have jurisdiction, upon the application of the guardians, to make an affiliation order against the putative father of the child under s. 5 of the Bastardy Laws Amendment Act, 1873, notwithstanding that the child's mother has married and her husband is able to maintain it. PLYMOUTH GUARDIANS *v.* GIBBS - - **Div. Ct. 177**

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BETTING.
See under GAMING.

BICYCLE—*Liability to Toll—Bridge—Carriage "hung on Springs"*—5 *Geo.* 4, *c. cxiv. s.* 78.

By s. 78 of 5 Geo. 4, c. cxiv., the owners of a bridge across the Teign were authorized to take the following (amongst other) tolls for passage over the bridge: "For every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence":—

Held, that a bicycle ridden over the bridge was not within the section.

Quære, whether a bicycle is a "carriage hung on springs."

Cannan v. *Earl of Abingdon*, [1900] 2 Q. B. 66, considered. SIMPSON *v.* TEIGNMOUTH AND SHALDON BRIDGE COMPANY - - **C. A. 405**

2. —— *Liability to Toll—"Sledge, Drag, or such like Carriage"*—39 *Geo.* 3, *c. xxviii. (Local).*

By a special Act, passed in 1799, the trustees of a bridge were authorized to demand before any passage should be permitted over the bridge the following (amongst other) tolls: "For every sledge, drag, or such like carriage, the sum of sixpence":—

Held, that the clause did not authorize the charge of sixpence in respect of a bicycle passing over the bridge. SMITH *v.* KYNNERSLEY **C. A. 788**

BILL OF EXCHANGE—*Promissory Note—Joint and Several—Proviso as to giving Time to either Party—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 83.

The plaintiff sued as holder of a document described as a joint and several promissory note, which provided for the payment of certain money by instalments, the whole to become due on default in payment of any one instalment. It contained the following clause: "No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party":—

Held, that the document was a valid promissory note within the meaning of s. 83, sub-s. 1, of the Bills of Exchange Act, 1882.

BILL OF EXCHANGE—*continued.*

Kirkwood v. *Smith*, [1896] 1 Q. B. 582, overruled.

Yates v. *Evans*, (1892) 61 L. J. (Q.B.) 446, approved. KIRKWOOD *v.* CARROLL - **C. A. 531**

BILL OF LADING—Charterparty—Timber cargo —Mode of estimating value - 297
See SHIPPING. 2.

—— Harter Act (Act of Congress of U. S. A., 1893), s. 3—"Faults or errors in management of vessel" - - - 114
See SHIPPING. 1.

BILL OF SALE—*Hiring and Purchase Agreement—Intention of Parties to Agreement—Inference to be drawn from Facts—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act,* 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.

The owner of an hotel contracted with a purchaser for the sale of the hotel, and the chattels therein, for a lump sum. The purchaser, being short of a portion of the purchase-money, applied to the defendants for a loan on mortgage, which was refused; but it was arranged that the defendants should offer to purchase the chattels, and their offer was accepted and the money paid to the vendor. The defendants then entered into an agreement with the purchaser of the hotel for the hiring and purchase by instalments by him of the chattels, and this agreement contained a licence to seize the chattels on certain defaults being made. The purchase of the hotel was then completed, and the purchaser entered and carried on the business. Subsequently the defendant seized the chattels on a default being made. The purchaser became bankrupt, and his trustee claimed the chattels, and brought this action to recover them. The learned judge before whom the case came decided that the true inference from the facts was that the money paid by the defendants was a loan to the purchaser of the hotel to enable him to complete the purchase, and that the hire-purchase agreement was a security for that loan, and was void for want of registration under the Bills of Sale Acts, and gave judgment for the plaintiff. On appeal:—

Held, that there was evidence to support the conclusion that the defendants had advanced the money by way of a loan upon the security of the hire-purchase agreement, and that, as the only claim of the defendants to the chattels arose under that agreement, which was void for want of registration as a bill of sale, the plaintiff was entitled to recover.

Judgment of Wright J., [1902] 1 K. B. 137, affirmed. TRUSTEE OF G. MELLOR (A BANKRUPT) *v.* MAAS - - - - - **C. A. 226**

BOROUGH.
See under CORPORATION.

BREACH OF CONTRACT — Appeal — Order whether final or interlocutory - 547
See PRACTICE. 1.

—— Bonâ fide advice — Conspiracy—Intent to injure - - - - 118
See ACTION.

—— Right of bankrupt to sue—Intervention of trustee - - - - 137
See BANKRUPTCY. 8.

BREACH OF COVENANT — Determination of lease—Notice — Liability of lessee for past breaches of covenant - 356
See LANDLORD AND TENANT. 2.

BREACH OF TRUST—Unauthorized investment —Bankruptcy of trustee—Proof against bankrupt's estate - - - 439
See BANKRUPTCY. 5.

BREACH OF WARRANTY — Seaworthiness — Steamship insufficiently provided with coal - - - - - 367
See INSURANCE, MARINE. 5.

BRIDGE—Bicycle—Liability to toll—"Carriage hung on springs" - - - 405
See BICYCLE. 1.

BUILDING—"Drain"—Semi-detached houses— "One building only"—Local Government - - - - 44
See SEWERS.

—— Street, New—Paving expenses—"Owner" —Building agreement - - 881
See LONDON. 2.

CALL—Forfeited shares — Sale of — Power to make fresh call on purchaser - 461
See COMPANY. 1.

CARRIAGE—Bicycle—Liability to toll—Bridge "Carriage hung on springs" - 405
See BICYCLE. 1.

CARRIER—*Common Carrier—Inherent Unfitness of Thing to be carried—Damage arising from—Liability of Carriers.*

The defendants contracted with the plaintiff as common carriers to carry for him an engine from his yard to a neighbouring town on the defendants' railway. The engine was on wheels and fitted with shafts to allow of its being drawn by horses. While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke; the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either the plaintiff or the defendants, and could not have been discovered by any ordinary examination:—

Held, that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were excused. LISTER *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - **Div. Ct. 878**

2. —— *Lighterman—Contract—Exemption for "Loss of Goods which can be covered by Insurance" —Negligence of Carrier's Servants—Liability of Carrier*

Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost:—

Held, that the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants. PRICE & Co. *v.* UNION LIGHTERAGE COMPANY - - **Walton J. 750**

CARRIER—*continued.*

—— Contract of carriage—Conveyance of goods by passenger train - - - 741
See Railway.

CASES :—

—— *Attorney-General* v. *Johnson*, [1902] 1 K. B. 416.
Reversed by C. A. [1903] **1 K. B. 617**
Followed by Ridley J. Attorney-General *v.* Holder [1903] **1 K. B. 832**

—— *Attorney-General* v. *Montagu (Lord)*, [1902] 1 K. B. 429.
Reversed by C. A. [1903] **1 K. B. 483**

—— *Attorney-General* v. *Worrall*, [1895] 1 Q. B. 99.
Followed by Ridley J. Attorney-General *v.* Holden [1903] **1 K. B. 832**

—— *Bailey* v. *Thurston & Co.*, [1902] 2 K. B. 397
Affirmed by C. A. [1903] **1 K. B. 137**

—— *Baynes & Co.* v. *Lloyd & Co.*, [1895] 2 Q. B. 610.
Considered by C. A. Jones *v.* Lavington - - - [1903] **1 K. B. 253**

—— *Beaumont* v. *Bowers* - [1900] 2 Q. B. 204
Not followed by C. A. Hudson *v.* Gribble - - [1903] **1 K. B. 517**

—— *Belton* v. *Busby* - [1899] 2 Q. B. 380
Followed by Div. Ct. Thomans *v.* Hodkinson - - [1903] **1 K. B. 30**
Followed by C. C. R. Rex *v.* Deaville [1903] **1 K. B. 468**

—— *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123
Approved of and followed by Div. Ct. Smith *v.* Gold Coast and Ashanti Explorers, Limited - [1903] **1 K. B. 285**

—— *Browne* v. *Warner*, (1807) 14 Ves. 156, 409; 9 R. R. 259.
Followed by C. A. Zimbler *v.* Abrahams - - [1903] **1 K. B. 577**

—— *Cannan* v. *Abingdon (Earl of)*, [1900] 2 Q. B. 66.
Considered by C. A. Simpson *v.* Teignmouth and Shaldon Bridge Co. [1903] **1 K. B. 405**

—— *Cawthorne* v. *Cordrey*, (1863) 13 C. B. (N.S.) 406.
Dicta in, approved of and followed by Div. Ct. Smith *v.* Gold Coast and Ashanti Explorers, Limited [1903] **1 K. B. 285**

—— *Cheshire Lines Committee* v. *Lewis*, (1880) 50 L. J. (Q.B.) 121.
Considered by C. A. Zimbler *v.* Abrahams - - [1903] **1 K. B. 577**

—— *Chidley* v. *West Ham Churchwardens*, (1875) 32 L. T. 486.
Commented upon by C. A. Reynolds *v.* Ashby & Son, Limited [1903] **1 K. B. 87**

—— *Clarke* v. *Cuckfield Union*, (1852) 21 L. J. (Q.B.) 349.
Approved by C. A. Lawford *v.* Billericay Rural Council [1903] **1 K. B. 772**

CASES—*continued.*

—— *Edwards* v. *Godfrey* - [1899] 2 Q. B. 333
Considered by Div. Ct. Isaacson *v.* New Grand (Clapham Junction), Limited [1903] **1 K. B. 539**

—— *Fulham Vestry* v. *Minter*, [1901] 1 K. B. 501.
Overruled by C. A. London County Council *v.* Wandsworth Borough Council - - [1903] **1 K. B. 797**

—— *Gas Light and Coke Co.* v. *Mead*, (1876) 45 L. J. (M.C.) 71.
Overruled by C. A. Gas Light and Coke Co. *v.* Cannon Brewery Co. [1903] **1 K. B. 593**

—— *Gough* v. *Wood & Co.* [1894] 1 Q. B. 713
Distinguished by C. A. Reynolds *v.* Ashby & Son, Limited [1903] **1 K. B. 87**

—— *Great Western Ry. Co.* v. *Blades*, [1901] 2 Ch. 624.
Approved by C. A. *In re* Todd, Birleston & Co. and North Eastern Ry. Co. [1903] **1 K. B. 603**

—— *Hext* v. *Gill* - (1872) L. R. 7 Ch. 699
Commented on by C. A. *In re* Todd, Birleston & Co. and North Eastern Ry. Co. - - [1903] **1 K. B. 603**

—— *Hobson* v. *Gorringe* - (1897) 1 Ch. 182
Applied by C. A. Reynolds *v.* Ashby & Son, Limited - [1903] **1 K. B. 87**

—— *Holland* v. *Kensington Vestry*, (1867) L. R. 2 C. P. 565.
Followed by Div. Ct. Driscoll *v.* Battersea Borough Council [1903] **1 K. B. 881**

—— *Hunter* v. *Rex* - - [1902] 2 K. B. 255
Reversed by C. A. [1903] **1 K. B. 514**

—— *Jersey (Earl)* v. *Neath Guardians*, (1889) 22 Q. B. D. 555,
Commented on by C. A. *In re* Todd, Birleston & Co. and North Eastern Ry. Co. - - [1903] **1 K. B. 603**

—— *Jones* v. *Ocean Coal Co.*, [1899] 2 Q. B. 124.
Followed by C. A. Giles *v.* Belford, Smith & Co. - [1903] **1 K. B. 843**

—— *Kirkwood* v. *Smith* - [1896] 1 Q. B. 582
Overruled by C. A. Kirkwood *v.* Carroll - - [1903] **1 K. B. 531**

—— *Kodak, Limited* v. *Clark*, [1902] 2 K. B. 450.
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—— *Leggott* v. *Western* (1884) 12 Q. B. D. 287
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—— *Leigh* v. *Taylor* - - [1902] A. C. 157
Discussed by C. A. Reynolds *v.* Ashby & Son, Limited - [1903] **1 K. B. 87**

—— *Lord Provost of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657.
Explained by C. A. *In re* Todd, Birleston & Co. and North Eastern Ry. Co. - - - [1903] **1 K. B. 603**

—— *Lysons* v. *Knowles & Sons* [1901] A. C. 79
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—— *Maskelyne & Cooke* v. *Smith*, [1902] 2 K. B. 158.
Affirmed by C. A. **[1903] 1 K. B. 671**

—— *Mellor (Trustee of)* v. *Maas*, [1902] 1 K. B. 137.
Affirmed by C. A. **[1903] 1 K. B. 226**

—— *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.*, [1901] 2 K. B. 753.
Reversed by C. A. **[1903] 1 K. B. 652**

—— *Miller* v. *Law Accident Insurance Co.*, [1902] 2 K. B. 694.
Affirmed by C. A. **[1903] 1 K. B. 712**

—— *Mostyn (Lord)* v. *Fitzsimmons*, [1902] 1 K. B. 512.
Reversed by C. A. **[1903] 1 K. B. 359**

—— *Nicholson* v. *Bradfield Union*, (1886) L. R. 1 Q. B. 620.
Approved by C. A. LAWFORD *v.* BILLERICAY RURAL COUNCIL **[1903] 1 K. B. 772**

—— *Parker* v. *Taswell*, (1858) 2 De G. & J. 559.
Followed by C. A. ZIMBLER *v.* ABRAHAMS - - **[1903] 1 K. B. 577**

—— *Pitt, Ex parte*, (1833) 2 Dowl. 439; 39 R. R. 734.
Followed by Div. Ct. *In re* A SOLICITOR **[1903] 1 K. B. 857**

—— *Pritchard* v. *Merchants' Life Assurance Society*, (1858) 3 C. B. (N.S.) 622.
Distinguished by C. A. STUART *v.* FREEMAN - - **[1903] 1 K. B. 47**

—— *Reg.* v. *Hutchings* - (1881) 6 Q. B. D. 300
Distinguished by C. A. WAKEFIELD CORPORATION *v.* COOKE **[1903] 1 K. B. 417**

—— *Reg.* v. *McKenzie* - [1892] 2 Q. B. 519
Discussed by Div. Ct. SMITH *v.* MOODY **[1903] 1 K. B. 56**

—— *Rochdale Union and Haslingden Union, In re*, [1899] 1 Q. B. 540.
Followed by C. A. IN THE MATTER OF GODSTONE RURAL COUNCIL AND CATERHAM URBAN COUNCIL **[1903] 1 K. B. 554**

—— *Salmon, In re* - (1889) 42 Ch. D. 356–8.
Dictum of Kekewich J. in, applied by Wright J. *In re* LAKE **[1903] 1 K. B. 439**

—— *Scoble* v. *India (Secretary of State in Council for)*, [1902] 2 K. B. 413.
Reversed by C. A. **[1903] 1 K. B. 494**

—— *Shubrook* v. *Tufnell*, (1882) 9 Q. B. D. 621.
Followed by C. A. BOZSON *v.* ALTRINCHAM URBAN COUNCIL **[1903] 1 K. B. 547**

—— *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188.
Judgment of Lindley J. in, dissented from by Lord Alverstone C.J. SHEFFIELD CORPORATION *v.* BARCLAY **[1903] 1 K. B. 1**

—— *Smith* v. *Gold Coast and Ashanti Explorers, Limited*, [1903] 1 K. B. 285.
Affirmed by C. A. **[1903] 1 K. B. 538**

—— *Spraight* v. *Farnworth*, (1880) 5 Q. B. D. 115.
Approved by C. A. MEDITERRANEAN AND NEW YORK STEAMSHIP CO. *v.* A. F. & D. MACKAY - **[1903] 1 K. B. 297**

—— *Stock* v. *Meakin* - - [1900] 1 Ch. 683
Followed by C. A. SURTEES *v.* WOODHOUSE - - **[1903] 1 K. B. 396**

—— *Torkington* v. *Magee* - [1902] 2 K. B. 427
Reversed by C. A. **[1903] 1 K. B. 644**

—— *Tromans* v. *Hodkinson*, [1903] 1 K. B. 30.
Followed by C. C. R. REX *v.* DEAVILLE **[1903] 1 K. B. 468**

—— *Uzielli* v. *Boston Marine Insurance Co.*, (1884) 15 Q. B. D. 11.
Discussed by Bigham J. WESTERN ASSURANCE COMPANY OF TORONTO *v.* POOLE **[1903] 1 K. B. 376**

—— *Valay* v. *St. Leonards Wharf Co.*, (1903) 1 L. G. R. 305.
Distinguished by Wright J. STOCKDALE *v.* ASCHERBERG **[1903] 1 K. B. 873**

—— *Wakefield Corporation* v. *Cooke*, [1902] 1 K. B. 188.
Reversed by C. A. **[1903] 1 K. B. 417**

—— *Wilkins, Ex parte*, (1895) 64 L. J. (M.C.) 221.
Discussed by Div. Ct. SMITH *v.* MOODY **[1903] 1 K. B. 56**

—— *Wilson & Co.* v. *Osborn*, [1901] 2 K. B. 110
Disapproved by C. A. *In re* A DEBTOR **[1903] 1 K. B. 705**

—— *Yates* v. *Evans* (1892) 61 L. J. (Q.B.) 446
Approved of by C. A. KIRKWOOD *v.* CARROLL - - **[1903] 1 K. B. 531**

—— *Young* v. *Turing*, (1841) 2 Man. & G. 593; 58 R. R. 477, 484.
Dictum in, at p. 601, not followed by C. A. ANGEL *v.* MERCHANTS' MARINE INSURANCE CO. - **[1903] 1 K. B. 811**

CHARGING ORDER—Jurisdiction—Application to enforce charge by order for sale of shares - - - - **534**
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CHOSE IN ACTION—*Assignment—Contract to sell Reversionary Interest—Assignment by Purchaser of Benefit of Contract—Right of Assignee to sue Vendor for Damages—Legal Chose in Action—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.
Judgment of the Divisional Court, [1902] 2 K. B. 427, reversed. TORKINGTON *v.* MAGEE **C. A. 644**

CLAY—Compulsory purchase—Mines and minerals - - - - - **603**
See MINES.

COAL—Ship—Warranty of seaworthiness—Provision that charterers should provide coal - - - - - **362**
See SHIPPING. 5.

COMPANY — *Call unpaid—Forfeited Shares—Sale of—Power to make Fresh Call on Purchaser—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Sched. I., Table A, art.* 22.

A. was the holder of certain partially paid shares in the plaintiff company. The plaintiffs having called up the balance remaining unpaid on the shares, A. neglected to pay the call. The plaintiffs then declared A.'s shares to be forfeited, and sold the shares so forfeited to the defendants; and issued to the defendants a certificate in which they stated that the unpaid call was payable by A., and that the defendants were to be deemed to be the holders of the said shares "discharged from all calls due prior to the date hereof." Subsequently the plaintiffs made a fresh call upon the defendants on account of the balance of the shares which still remained unpaid. The defendants refused to pay, upon the ground that the plaintiffs having once called up the unpaid balance of the shares had exhausted their power of making calls, and that by the terms of the certificate, which followed the language of Table A, art. 22, in Sched. I. of the Companies Act, 1862, and was consequently intra vires, the remedy of the plaintiffs for the unpaid portion of the shares was against A. alone:—

Held, that the defendants were liable to pay the fresh call; that the object of art. 22 was only to enable the company to give a good title to the purchaser of the forfeited shares, and that it relieved him only from liability in respect of calls due prior to the purchase, and did not discharge him from the obligation to pay fresh calls for the amount unpaid on the shares. RANDT GOLD MINING COMPANY *v.* NEW BALKIS EERSTELING LIMITED - - - - - **C. A. 461**

2. —— *Winding-up—Liquidator—Power to compromise Action—Extraordinary Resolution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 160.

A compromise by the liquidator of a company in voluntary liquidation of a claim by the company against a third party is, if not set aside, binding on the company, although entered into by the liquidator without obtaining the sanction of an extraordinary resolution of the company under s. 160 of the Companies Act, 1862. CYCLE-MAKERS' CO-OPERATIVE SUPPLY COMPANY *v.* SIMS **Div. Ct. 477**

—— Charging order — Practice—Jurisdiction—Application to enforce charge by order for sale of shares - - - 534
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—— Income tax — Company resident in the United Kingdom—Holding preponderating majority of shares in company abroad - - - - 505
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COMPENSATION—Lands compulsorily taken—Tied house - - - - 569
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—— Land injuriously affected—Interest created after notice to treat - - 652
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—— Waterworks—Lands compulsorily taken—Special adaptability - - 574
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—— Workmen's Compensation Act.
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COMPOSITION—Proposal of, after discharge of bankrupt - - - - 628
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COMPROMISE—Company—Winding-up—Liquidator—Power to compromise action 477
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CONSIDERATION — Executed — Corporation—Contract not under seal - - 772
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—— Inducing breach of contract—Bonâ fide advice—Intent to injure - - 118
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CONTRACT—Assignment—Right of assignee to sue vendor for damages - - 644
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—— Frauds, Statute of—Contract not to be performed within a year—Employment for a year - - - - 538
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—— Lighterman—Negligence of carrier's servants—Liability - - - 750
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CONTRACTOR—"Workman"—Independent contractor - - - - 851
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CONVEYANCING AND LAW OF PROPERTY—Mortgages—Consolidation - 147
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CONVICTION—Insufficiently describing offence
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—— Previous conviction — Evidence—Register of convictions in Court of summary jurisdiction - - - - 895
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COPYRIGHT — *Music — Justices — Seizure of Pirated Copies of Music—Order of Court of Summary Jurisdiction—Summons, Necessity for—Musical (Summary Proceedings) Copyright Act,* 1902 (2 *Edw.* 7, *c.* 15), *s.* 2.

Where pirated copies of music have been seized by a constable under s. 2 of the Musical (Summary Proceedings) Copyright Act, 1902, a Court of summary jurisdiction has no power to make an order under s. 2 forfeiting, destroying, or otherwise dealing with such copies, unless the person from whom they have been seized has, by means of a summons, been notified of the intention to apply for such order. *Ex parte* FRANCIS **Div. Ct. 275**

CORPORATION —*Borough Fund —Resolution of Owners and Ratepayers—Demand of Poll, What amounts to — Municipal Corporation — Borough Funds Act,* 1872 (35 *&* 36 *Vict. c.* 91), *s.* 4—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *Sched. III., r.* 6.

By Sched. III., r. 6, of the Public Health Act, 1875, which schedule contains the rules as to resolutions of owners and ratepayers under the Act, it is provided that the chairman shall propose the resolution, and the meeting shall decide for or against its adoption, "provided, that if any owner or ratepayer demands that such question be decided by a poll of owners and ratepayers," the poll is to be taken in the manner therein provided. A resolution having been declared carried at a meeting of owners and ratepayers, one of the ratepayers present demanded a poll, and another rose and seconded it, "if necessary"; the latter was told by the town clerk that it was unnecessary to second the demand, which had been acceded to; the meeting then separated. Subsequently the original demand for a poll was withdrawn by its proposer, and the mayor refused to treat the action of the seconder as a demand of a poll by him. Upon an application by the second ratepayer for a mandamus to the mayor:—

Held, that the action of the applicant was in substance a demand of a poll by him within the meaning of rule 6 of the schedule.

Quære, whether the original demand for a poll could be withdrawn after the close of the meeting. THE KING *v.* DOVER (MAYOR OF) **Div. Ct. 668**

2. —— *Contract not under Seal—Executed Consideration—Work done at Request of Corporation—Contract to pay implied from Acceptance of Benefit.*

Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied.

Clarke v. *Cuckfield Union*, (1852) 21 L. J. (Q.B.) 349, and *Nicholson* v. *Bradfield Union*, (1866) L. R. 1 Q. B. 620, approved. LAWFORD *v.* BILLERICAY RURAL DISTRICT COUNCIL **C. A. 772**

—— Manchester Corporation — Income tax — Salary — Deductions — Contribution to thrift fund - - - - **517**
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—— Execution creditor—Sheriff's fees—Possession money - - - - **680**
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—— Lands Clauses Act, Costs of inquiry under —Taxation - - - - **231**
See LANDS CLAUSES ACTS. 2.

—— Lease — Renewal "at costs of lessee" — Award - - - - **349**
See LANDLORD AND TENANT. 6.

—— Parliamentary agent—Taxation—Solicitor **189**
See SOLICITOR. 1.

—— Payment into court with denial of liability —Discretion of judge - - **358**
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—— "Petitioning creditor"—Costs of rehearing petition - - - - **735**
See BANKRUPTCY. 3.

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—— Treasury Solicitor—Direction to appear for subject—Matter in which the Crown has an interest—Right to costs - **289**
See SOLICITOR. 3.

—— Two defendants jointly represented—Judgment for one defendant and against the other - - - - - **282**
See PRACTICE. 4.

COUNSEL.
See BARRISTER.

COUNTY COURT—*Costs—Discretion of Judge over Costs of specific Issues—Practice—Payment into Court with Denial of Liability.*

The plaintiff having brought an action in the county court for personal injuries caused by the defendants' negligence, the defendants paid money into court with a denial of liability. A trial was had, but on appeal the Divisional Court ordered a new trial, with costs of the first trial to abide the event. On the second trial the plaintiff recovered a verdict, but for no more than the amount paid into court:—

Held, that, though the defendants were entitled to the general costs of the action, the county court judge had a discretion to give the plaintiff his costs of the issue of negligence on which he had succeeded, and that that discretion was not taken away by the order of the Court that the costs should abide the event. DUNN *v.* SOUTH EASTERN AND CHATHAM RAILWAY COMPANY **Div. Ct. 358**

COUNTY COURT—*continued.*

2. —— *Jurisdiction—Claim for Injunction only—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 56—*Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89.

An action, in which an injunction only is claimed, is within the jurisdiction of a county court, provided that the case is one in which, if there had been a claim for damages, the claim must have been for an amount within the jurisdiction of a county court. STILES *v.* ECCLESTONE **Div. Ct. 544**

—— Costs—Detinue—Action founded on tort—Return during progress of case of articles claimed - - - - **104**
See PRACTICE. 3.

—— Workmen's compensation—Right of appeal from dismissal of action - - **539**
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COVENANT—Determination of lease—Notice—Liability of lessee for past breaches of covenant - - - - **356**
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—— Mortgage of reversion — Real Property Limitation Act - - - **756**
See LIMITATIONS, STATUTE OF. 1.

—— Outgoings, Covenant by lessee to pay—Private street works - - **396**
See LANDLORD AND TENANT. 4.

—— Quiet enjoyment—Implication arising from the word "let"—Underlease - **253**
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—— Running with land—Lands compulsorily taken—Compensation—Tied house **569**
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CRIMINAL LAW—*Conviction insufficiently describing Offence—Conspiracy and Protection of Property Act,* 1875 (38 *&* 39 *Vict. c.* 86), *s.* 7—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 39, *sub-s.* 1.

By s. 7 of the Conspiracy and Protection of Property Act, 1875, a person commits an offence who, "with a view to compel any other person to abstain from doing . . . . any act which such other person has a legal right to do . . . . wrongfully and without legal authority . . . . (1) injures his property."

The appellant was convicted under this section, the conviction stating that the appellant, on February 4, 1902, "with a view to compel" the respondent "to abstain from working for Messrs. J. B. & Partners, Limited, at F. Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property" of the respondent:—

Held, that the act, which the appellant sought to compel the respondent to abstain from doing, was sufficiently specified in the conviction; but that the conviction was bad on its face, and must be quashed, in that it did not specify what property of the respondent had been injured.

Reg. v. *McKenzie*, [1892] 2 Q. B. 519, and *Ex parte Wilkins*, (1895) 64 L. J. (M.C.) 221, discussed.

The Summary Jurisdiction Act, 1879, s. 39, sub-s. 1, which provides that in proceedings before Courts of summary jurisdiction "the description of any offence in the words of the Act . . . . creating the offence, or in similar words, shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question. SMITH *v.* MOODY - **Div. Ct. 56**

2. —— *High Treason—Practice—Motion to quash Indictment—Expatriation in Time of War—Naturalization Act,* 1870 (33 *&* 34 *Vict. c.* 14), *s.* 6.

On a trial for high treason the Court will not entertain a motion to quash the indictment as defective, but will leave the prisoner to his remedy by motion in arrest of judgment or by writ of error.

The Naturalization Act, 1870, provides by s. 6 that "Any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien":—

Held, that the section does not empower a British subject to become naturalized in an enemy State in time of war; and that the act of becoming naturalized under such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy. THE KING *v.* LYNCH - - - **Div. Ct. 444**

3. —— *Sale of Intoxicating Liquor to Children—Vessel not properly Sealed—Evidence—Gummed Paper Label—Intoxicating Liquors (Sale to Children) Act,* 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

The appellant was charged under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, with selling beer to a child under fourteen, the beer not being sold in a sealed vessel. It was proved that a gummed paper label was affixed over the screw stopper of the bottle, extending about an inch down two sides of the neck of the bottle. The label was dry at the time of the sale, but by moistening the label with the tongue and so damping the gum the label could be removed without its being torn. The justices found that the bottle was not sealed as required by the Act, and convicted the appellant:—

Held, that there was evidence to support the finding of the justices. MITCHELL *v.* CRAWSHAW **Div. Ct. 701**

—— Conviction for drunkenness—Evidence—Register of convictions in Court of summary jurisdiction - - - **895**
See JUSTICES.

CROWN—*Prosecution—Summary Proceedings—Information under Acts relating to Revenue—Costs—Summary Jurisdiction Acts,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 18, *and* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 53.

By virtue of the Summary Jurisdiction Acts, 1848 (s. 18) and 1879 (s. 53), a Court of summary jurisdiction has power to give costs for or against the Crown in proceedings taken by the Crown under any of the statutes relating to His Majesty's

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revenue under the control of the Commissioners of Inland Revenue. THOMAS *v.* PRITCHARD Div. Ct. 209

—— Treasury Solicitor—Direction to appear for subject—Right to costs - - 289
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DANGEROUS GOODS—Knowledge of vendor—Duty of vendor to purchaser—Warranty of fitness - - - - 155
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See REVENUE. 9.

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"DEPENDANTS"—Workmen's compensation
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DETINUE — Costs — Action founded on tort — Return during progress of case of articles claimed - - - 104
See PRACTICE. 3.

DISCHARGE — Life insurance company — Payment into court—No sufficient discharge otherwise obtainable - - 184
See INSURANCE, LIFE. 1.

DISCRETION—Costs—Payment into court with denial of liability—Discretion of judge
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DIVIDEND—Receiving order—Scheme of arrangement - - - - - 794
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DOCK—Workmen's compensation—Dock labourer
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DRAINS.
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DRUNKENNESS—Conviction—Evidence—Register of convictions in Court of summary jurisdiction - - - - 895
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DUTY—Public revenue.
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ELECTION—Judgment signed against one of two defendants—Alternative liability 64
See HUSBAND AND WIFE.

EMPLOYER AND WORKMAN—*Compensation—Agriculture, Employment in—Accident elsewhere than on Land of Employer—Workmen's Compensation Act*, 1900 (63 & 64 *Vict. c.* 22).

To entitle an applicant to an award of compensation under the Workmen's Compensation Act, 1900, it is not necessary that the employment of the workman, at the time of the accident in respect of which compensation is sought, should have been "on or in or about" the land of the employer. SMITHERS *v.* WALLIS C. A. 200

2. —— *Compensation—"Dependants"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2; *Sched. I., clause* 1 (*a*), (*ii.*).

A pauper inmate of a workhouse, towards whose maintenance no contribution is in fact made by his son, is not as a matter of law in part dependent on the son's earnings within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, notwithstanding the son's indirect obligation under the poor law to contribute to his father's maintenance. REES *v.* PENRIKYBER NAVIGATION COLLIERY COMPANY C. A. 259

3. —— *Compensation—Dock Labourer—Average Weekly Earnings—Mode of Calculation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *First Sched.* (1.) (*b*).

A stevedore's labourer claimed compensation under the Workmen's Compensation Act, 1897, in respect of injuries occasioned to him by an accident on November 28, 1902, while in the employment of a firm of master stevedores. He was not engaged by the firm for any definite period, but had been from time to time employed by them, as labour was required, upon tendering himself for employment. During the year prior to November 28, with the exception of the months of May, June, and July, when he was in hospital, he had been employed by the firm upon a greater or less number of days in most weeks. He was not employed by the firm from the 2nd to the 10th of November, but on the days from

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the 11th to the 28th he was employed by them. The county court judge found that during the period between the 2nd and 10th of November he was not in the employment of the firm, but that from the 11th to the 28th he was continuously in their employment, and awarded him compensation based upon the average of his weekly earnings during the last-mentioned period:—

Held, that, notwithstanding the decision of the House of Lords in *Lysons* v. *Knowles & Sons*, [1901] A. C. 79, the decision of the county court judge was correct.

Jones v. *Ocean Coal Co.* [1899] 2 Q. B. 124, followed. GILES *v.* BELFORD, SMITH & CO. **C. A. 843**

4. —— *Compensation—Engineering Work—Employment within Area of Work—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A contract was entered into for the construction of a reservoir and for laying down pipes for the supply of water from it. The contractor was engaged in constructing the reservoir by means of machinery worked by steam power, and had staked out and taken possession of the land in which the pipes were to be laid. A workman in the employment of the contractor was engaged in laying pipes in a trench, at a point 500 yards distant from the reservoir, by means of a crane worked by hand power. While using the crane he met with an accident which caused injury to his hand. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the work of constructing the reservoir and laying the pipes was one piece of work, and made an award in favour of the applicant. On appeal:—

Held, that at the time of the accident the workman was employed on or in or about an engineering work, within the meaning of s. 7 of the Act. ATKINSON *v.* LUMB - - **C. A. 861**

5. —— *Compensation—"Factory"—Machinery used in loading or unloading Ship—"Harbour"—"Navigable River"—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

By the Interpretation Act, 1889, s. 38, sub-s. 1, "Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

The Factory and Workshop Act, 1901, repeals the Factory Act, 1895, and, so far as the definition of a "factory" is concerned, re-enacts by s. 104 the definition in the former Act with certain additions:—

Held, that the modification mentioned in the Interpretation Act, 1889, includes additions; and that consequently, in the definition of a "factory" in the Workmen's Compensation Act, 1897, the reference to the Factory and Workshop Act, 1895, must be construed as if it were a reference to the provisions of s. 104 of the Factory and Workshop Act, 1901, so as to include in the definition, among other things, machinery used in the process of unloading a ship in a navigable river. STEVENS *v.* GENERAL STEAM NAVIGATION COMPANY **C. A. 890**

6. —— *Compensation — Indemnity — Amount fixed by Agreement—Right to Indemnity from Person Liable—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 6.

Sect. 6 of the Workmen's Compensation Act, 1897, provides that where the injury for which compensation is payable under the Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of it, the workman may, at his option, "proceed, either at law against that person to recover damages, or against his employer for compensation under this Act . . . . and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person":—

Held, that the section applied where the compensation was paid under an agreement made between the injured workman and the employer after notice of the accident and of the claim for compensation had been given by the workman to the employer, but before any further proceedings had been taken. THOMPSON & SONS *v.* NORTH EASTERN MARINE ENGINEERING COMPANY **Kennedy J. 428**

7. —— *Compensation — Mines — "Accident arising out of and in the course of the Employment" — Workman leaving Mine after ceasing Work—Disobedience of Orders—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

The appellant, a workman, while working in the respondents' colliery, was, for disobedience of orders, suspended from work, pending an inquiry into the matter by the under-manager of the colliery. It appeared that men were not allowed to remain in the workings of the colliery when not at work; and the practice was for a workman who was suspended while at work to go to the pit bottom, i.e., the bottom of the shaft in which the cage worked, by which access to or egress from the mine was obtained. The appellant, when he was suspended, went into a place, called a "pass-by," at the side of the tramway leading to the pit bottom. While sitting there he was ordered by the deputy to go to the pit bottom. He remained however in the pass-by, where, about two hours later, a fall from the roof took place, by which he was injured. If the appellant had gone to the pit bottom as directed, he could not have got out of the mine till the cage went up in the ordinary course, which was later than the time at which the accident happened. Upon a claim by the appellant for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the accident did not arise out of and in the course of the appellant's employment:—

Held, that there was evidence upon which he was entitled so to find. SMITH *v.* SOUTH NORMANTON COLLIERY COMPANY - **C. A. 204**

8. —— *Compensation — Scaffolding — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman was injured by an accident while painting the outside of a house, more than thirty

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feet high, which was being repaired. In order to paint the lower part of the outside of the house he was standing, at the time of the accident, on painter's steps of a height of eight feet, constructed with steps on one side and wooden supports on the other. On appeal from an award under the Workmen's Compensation Act, 1897, in favour of the employers:—

Held (by Collins M.R. and Mathew L.J., Stirling L.J. dissenting), that there was evidence on which the county court judge could have found that the house was being repaired by means of a scaffolding within the meaning of s. 7, sub-s. 1, of the Act. ELVIN *v.* WOODWARD & Co. - - - - - - **C. A. 838**

9. —— *Compensation — "Workman"— Independent Contractor — Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Where a man was injured by an accident while doing work for manufacturers at their works as an independent contractor with them, and not as their servant:—

Held, that he was not a workman in their employment within the meaning of the Workmen's Compensation Act, 1897. VAMPLEW *v.* PARKGATE IRON AND STEEL COMPANY **C. A. 851**

10. —— *Practice—County Court—Dismissal of Action under Employer's Liability Act*, 1880 (43 *&* 44 *Vict. c.* 42)—*Application for Compensation under Workmen's Compensation Act*, 1897—*Right of Appeal from Dismissal of Action—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1, *sub-ss.* 2, 4.

Where, upon the dismissal of an action under the Employer's Liability Act, 1880, an application is made under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, for an assessment of compensation under that Act, the making of that application does not amount to the exercise of an option on the part of the plaintiff so as to estop him from appealing against the dismissal of the action under the Employer's Liability Act, and the plaintiff is entitled to appeal against both decisions.

Edwards v. *Godfrey*, [1899] 2 Q. B. 333, considered. ISAACSON *v.* NEW GRAND (CLAPHAM JUNCTION), LIMITED - - **Div. Ct. 539**

—— Action, Cause of—Inducing breach of contract—Bonâ fide advice—Conspiracy—Intent to injure - - - **118**
See ACTION.

—— Frauds, Statute of—Contract not to be performed within a year—Employment for a year - - - - **538**
See FRAUDS, STATUTE OF.

ENGINEERING WORK—Workmen's compensation — Employment within area of work - - - - - **861**
See EMPLOYER AND WORKMAN. 4.

EQUITABLE DEFENCE — Plaintiff suing as trustee—Unliquidated damages due to defendant from cestui que trust - **549**
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EQUITABLE EXECUTION—Receiver, Appointment of—Decreet of Court of Session in Scotland - - - - **760**
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See Cases under REVENUE.

ESTOPPEL—Res judicata—Private street works
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EVIDENCE—Previous conviction—Register of convictions in Court of summary jurisdiction - - - - **895**
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EXECUTION — Equitable — Receiver, Appointment of—Decreet of Court of Session in Scotland - - - - **760**
See RECEIVER.

—— Partners—Issue to determine liability **854**
See PARTNERSHIP. 1.

EXECUTION CREDITOR—"Costs of execution"—Sheriff's fees—Possession money **680**
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FACTORY — "Factory" — Machinery used in loading or unloading ship—"Navigable river" - - - - **890**
See EMPLOYER AND WORKMAN. 5.

FINAL OR INTERLOCUTORY—Order whether—Appeal—Order to try preliminary question of liability—Action dismissed
See PRACTICE. 1. **547**

FINANCE ACTS.
See under REVENUE.

FINE—Lease—Renewal "at costs of lessee"—Award - - - - **349**
See LANDLORD AND TENANT. 6.

FIRE—Charterparty—Exceptions—Applicability to charterer - - - - **262**
See SHIPPING. 3.

FIXTURES—*Machinery affixed to Freehold—Presumption of Law—Trade Fixtures—Mortgage—Hire-purchase Agreement—Rights of Mortgagee against Owner of Machinery—Licence to remove Trade Fixtures — Entry of Mortgagee into Possession.*

Machines were supplied by the plaintiff on the hire-purchase system to the lessee for a long term of years of a factory, which he had mortgaged. The machines were affixed to the premises by the plaintiff's workmen by means of upright bolts let into the floor, which passed through holes in the bases of the machines, and upon which nuts were screwed. By the terms of the hire-purchase agreement the machines were not to become the property of the mortgagor until the last of a series of payments for their hire had been made by him, and, if default were made in those payments, the plaintiff was to have power to determine the hiring and remove the machines. The mortgagor failed to make the specified payments. The mortgagees having entered into possession of the factory, the plaintiff gave notice to determine the hiring, and claimed to remove the machines, but the mortgagees refused to give them up, claiming them as fixtures. In an action brought by the plaintiff against the mortgagees to recover the machines

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or their value, the judge held, on the authority of *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, that the machines were fixtures, and gave judgment for the defendants without leaving any question to the jury.

Held, that the decision of the judge was right.

Leigh v. *Taylor*, [1902] A. C. 157, discussed.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, distinguished.

Chidley v. *West Ham Churchwardens* (1875) 32 L. T. 486, commented upon. REYNOLDS *v.* ASHBY & SON, LIMITED - - **C. A. 87**

FOREIGN COURT—Agreement to refer disputes to — "Submission" — Staying proceedings - - - - **249**
See ARBITRATION.

FOREIGN LAW—General average, Special provision in charterparty as to - **109**
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FORFEITURE—Company—Call unpaid—Forfeited shares—Power to make fresh call on purchaser - - - **461**
See COMPANY. 1.

FORGERY—Forged transfer of stock—Innocent presentment of, for registration – Implied contract to indemnify - - **1**
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FOOD AND DRUGS—Sale of.
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FRAUDS, STATUTE OF—*Contract not to be performed within a Year—Employment for one Year—To commence on Day next after Date of Contract—Solicitor—Frauds, Statute of* (29 *Car.* 2, *c.* 3), *s.* 4.

A contract to serve for one year, the service to commence on the day next after that on which the contract is made, is not a contract which is not to be performed within a year, within the meaning of the Statute of Frauds, s. 4.

Dicta in *Cawthorne* v. *Cordrey*, (1863) 13 C. B. (N.S.) 406, and in *Britain* v. *Rossiter*, (1879) 11 Q. B. D. 123, approved of and followed.

Judgment of the Divisional Court, [1903] 1 K. B. 285, affirmed. SMITH *v.* GOLD COAST AND ASHANTI EXPLORERS, LIMITED - **C. A. 538**

FRAUDULENT CONVEYANCE—*Deed of Arrangement with Creditors—Delaying Creditors—Registration—Contents of Debtor's Affidavit*—13 *Eliz. c.* 5—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57) *s.* 6, *sub-s.* 1.

A deed of arrangement with creditors, which is intended to give effect to a bonâ fide scheme of arrangement for their benefit, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, nor because some of the creditors are intentionally excluded from its operation.

A deed of arrangement is not void because the affidavit of the debtor, required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, to be filed upon the registration of the deed, does not contain the names and addresses of all the creditors.

Judgment of the Divisional Court, [1902] 2 K. B. 158, affirmed. MASKELYNE & COOKE *v.* SMITH - - - - - **C. A. 671**

FREIGHT—Charterparty—Lien on sub-freight
See SHIPPING. 4. **391**

—— Right to reduction of freight in respect of shortage—Timber cargo - - **297**
See SHIPPING. 2.

—— Ship—Mortgagee taking possession—Right to freight previously earned but unpaid
See SHIPPING. 6. **683**

GAMING—*Place used for Betting—Bar of Public-house—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

The appellant, who was a bookmaker, was in the habit of frequenting the bar of an inn at certain hours for the purpose of carrying on a business of ready-money betting with persons resorting thereto, and the fact of his carrying on that business in the bar was known to those persons. He carried on the business there by the permission of the landlord, but he did not for the purposes of it occupy any specific portion of the bar:—

Held, that the above facts amounted to a "use" of the bar by the appellant for the purposes of betting in contravention of s. 3 of the Betting Act, 1853.

Belton v. *Busby*, [1899] 2 Q. B. 380, followed. TROMANS *v.* HODKINSON - - **Div. Ct. 30**

Followed. *See next Case.*

2. —— *Place used for Betting—Bar of Public-house—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

Where a bookmaker is in the habit of frequenting the bar of a public-house for the purpose of carrying on a business of ready-money betting with persons resorting thereto, but for the purposes of that business does not occupy any specific portion of the bar, the question whether he "uses" the bar for the purpose of betting in contravention of s. 3 of the Betting Act, 1853, depends upon whether he so carries on his betting business there with the knowledge and permission of the occupier of the house.

Belton v. *Busby*, [1899] 2 Q. B. 380, and *Tromans* v. *Hodkinson*, [1903] 1 K. B. 30, followed. THE KING *v.* ALBERT DEAVILLE. THE KING *v.* JOHN DEAVILLE. THE KING *v.* SIMPSON **C. C. R. 468**

3. —— *Unlawful Gaming—Common Gaming-house—Shop containing Automatic Machine—Gaming House Act*, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

The appellant, a shopkeeper, had in his shop an automatic machine which was worked on the following principle: A person desiring to use it put a penny in a slot and pressed and released a spring. According to the force with which this was done the penny fell into one or other of seven compartments. If it fell into either of two compartments it was automatically returned to the sender, and if it fell into the centre compartment he received from the machine a ticket entitling him to twopennyworth of articles sold in the shop. If, however, the penny fell into any of the other compartments it was retained by the machine. It having been proved that a number of boys and men had used the machine on certain days and had lost and won money by means of it, the appellant was convicted under s. 4 of the Gaming House Act, 1854, of having

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opened, kept, and used his shop for the purpose of unlawful gaming being carried on therein:—

Held, that the conviction was right. FIELDING *v.* TURNER - - - - - Div. Ct. 867

GAS—*Arrears of Gas Rate—Right to recover from incoming Tenant—Gasworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 *&* 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Company's Act*, 1872 (35 *&* 36 *Vict. c. xxiii.*), *s.* 18.

By a special Act of the plaintiffs, a gas company, it was provided that "in case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and the incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him to do so."

Arrears being due to the plaintiffs from the tenant of premises in respect of gas supplied to him by the plaintiffs, he sold the lease of the premises and the goodwill of the business, which he there carried on, to the defendants, who continued to carry on the business upon the premises:—

Held, overruling the judgment of the Queen's Bench Division in *Gas Light and Coke Co.* v. *Mead*, (1876) 45 L. J. (M.C.) 71, that the effect of the above-mentioned section was to entitle the plaintiffs to recover the arrears due to them from the defendants. GAS LIGHT AND COKE COMPANY *v.* CANNON BREWERY COMPANY - C. A. 593

GAS LIGHT AND COKE COMPANY—Arrears of gas rate—Right to recover from incoming tenant - - - 593
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"**HARBOUR**"—"Factory"—"Navigable river"
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HIGH TREASON—Practice—Motion to quash indictment—Expatriation in time of war—Naturalization - - - 444
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HIRE-PURCHASE AGREEMENT—Trade fixtures—Entry of mortgagee into possession
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HIRING—And purchase agreement—Intention of parties—Inference to be drawn from facts - - - - - 226
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"**HOSPITAL**"—Settlement—Irremovability—Residence - - - - 19
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HOUSE DUTY—School buildings—"Other offices" - - - - 723
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HOUSE OF COMMONS—Costs—Taxation—Parliamentary agent—Solicitor - 189
See SOLICITOR. 1.

HOUSE OF LORDS—Costs—Taxation—Parliamentary agent—Solicitor - - 189
See SOLICITOR. 1.

HOUSING OF WORKING CLASSES—*Lands compulsorily taken—Compensation—Tied House—Covenant running with Land—Fair Market Value—Housing of the Working Classes Act*, 1890 (53 *&* 54 *Vict. c.* 70), *s.* 21.

In estimating, under s. 21 of the Housing of the Working Classes Act, 1890, the compensation payable in respect of the interest of the lessors in a house let as a public-house and taken compulsorily for the purposes of the Act, a covenant tying the house must be taken into consideration. *In re* CHANDLER'S WILTSHIRE BREWERY COMPANY AND LONDON COUNTY COUNCIL - Wright J. 569

HUSBAND AND WIFE—*Authority of Wife to pledge Husband's Credit—Goods supplied on Order of Wife—Joint Liability—Presumption arising from Cohabitation—Principal and Agent—Alternative Liability—Election—Judgment signed against one of two Defendants—Order* XIV., *r.* 5.

The facts that a husband and his wife, each having property, have been living together, and that necessaries have been supplied for the household on the orders of the wife, afford no evidence of a joint liability on the part of the husband and wife to pay for the necessaries so supplied. The presumption primâ facie arises in such a case of an actual authority impliedly given to the wife by the husband to pledge his credit for necessaries for the household, but that presumption may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit.

Where a claim was made in an action for the price of goods against a husband or his wife alternatively, and the plaintiffs under Order XIV. obtained leave to sign, and signed judgment for the amount claimed against the wife, who had separate property:—

Held, that the signing of judgment against the wife was a conclusive election by the plaintiffs to rely on her liability, and they could not afterwards insist on the liability of the husband.

Rule 5 of Order XIV. does not apply where the right of action can only be in the alternative against one or other of two defendants. MOREL BROTHERS & CO. *v.* EARL OF WESTMORELAND C. A. 64

ILLEGITIMATE CHILD—"Chargeable" to parish —Cost of relief - - - 177
See BASTARDY.

INDEMNITY—*Forged Transfer of Stock—Innocent Presentment of, for Registration—Implied Contract to Indemnify.*

T. and H. were the holders of certain stock of the plaintiff corporation. T. instructed a firm of stockbrokers to sell the stock, which they did. Before any transfer had been executed the purchasers pledged the stock with the defendants as security for an advance. A transfer purporting to be executed by both T. and H. in favour of the defendants was then handed to the defendants, who sent it to the plaintiffs for registration, and procured themselves to be registered as the holders. The defendants subsequently at the request of the pledgors transferred the stock to third parties, who in their turn were duly registered. Some time afterwards it was discovered that the signature of H. to the first-named transfer was a forgery, and upon an action being brought by him against the plaintiff corporation the latter were compelled to purchase stock to replace that which he had lost. The corporation then sued the defendants for an indemnity:—

Held, that the defendants in sending in the transfer to the plaintiffs for registration impliedly undertook to indemnify them against the consequences of registering it, and that, there being no negligence on either side, the loss must fall upon the defendants.

Judgment of Lindley J. in *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, dissented from. SHEFFIELD CORPORATION *v.* BARCLAY - - **Lord Alverstone C.J. 1**

—— Workmen's compensation—Amount fixed by agreement—Right to indemnity from person liable - - - **428**
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INFANT—Sale of intoxicating liquor to children —Vessel not properly sealed—Evidence
See CRIMINAL LAW. 3. **701**

INCOME TAX—Public revenue.
See Cases under REVENUE.

INJUNCTION—County court—Jurisdiction—Claim for injunction only - - **544**
See COUNTY COURT. 2.

—— Trade union—Action for injunction by individual member of union - - **308**
See TRADE UNION.

INN—Betting, Place used for—Bar of public-house - - - - **468**
See GAMING. 2.

—— Lands compulsorily taken—Compensation —Tied house - - - **569**
See HOUSING OF WORKING CLASSES.

INSURANCE, ACCIDENT—"*Intervening Cause*" —*Construction of Policy.*

A person insured himself with the defendants under a policy whereby the defendants agreed to pay him a certain sum in case he should be injured by accidental violence and should die within three months of its occurrence, if the injury should be the "direct and sole cause" of his death. The policy was subject to the condition that it should not apply to "death . . . . caused by or arising wholly or in part from" any "intervening cause." The assured on July 2 accidentally inflicted a wound on his leg with his thumbnail. His leg became inflamed, and on July 9 erysipelas had set in. This was followed on July 12 by septicæmia, and on July 16 by septic pneumonia, of which complaint he died on July 22. It was conceded by the defendants that the septic germs, the development of which resulted in the man's death, were introduced into his body at the time of the infliction of the wound:—

Held, that the erysipelas, septicæmia, and septic pneumonia were not "intervening causes" within the meaning of the policy, but merely different stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and that the man's death was directly and solely caused by the accidental injury to his leg. MARDORF *v.* ACCIDENT INSURANCE COMPANY - **Wright J. 584**

INSURANCE, LIFE—*Lost Policy—Payment into Court—No sufficient Discharge otherwise obtainable—Practice—Life Insurance Company—Life Assurance Companies (Payment into Court) Act*, 1896 (59 *&* 60 *Vict. c.* 8), *s.* 3—*Order* LIV. (*c*).

Where an action was brought against a life insurance company upon a life policy which had been lost, and the directors of the company were of opinion that no sufficient discharge could otherwise be obtained:—

Held, that the provisions of the Life Assurance Companies (Payment into Court) Act, 1896, were applicable, and therefore leave should be given to the defendants to pay the amount of the policy into the High Court under Order LIV. (*c*), r. 3. HARRISON *v.* ALLIANCE ASSURANCE COMPANY **C. A. 184**

2. —— *Yearly Insurance—Quarterly Payments of Premium—Days of Grace—Payment of Premium after Death of Assured—Payment within Days of Grace.*

The plaintiff was assignee of a policy of insurance on the life of another person. The policy was for a year, and the premium was payable quarterly, the first quarterly payment being made at the date of the policy. One of the conditions of the policy was that it should be of no effect if, at the time of the death of the assured, any quarterly premium should be more than thirty days in arrear. The assured died during the year after one of the dates fixed for payment of a quarterly premium, but within the days of grace, and the premium was paid after his death by the plaintiff, but also within the days of grace. In an action to recover the amount insured:—

Held, that the policy being for a year, subject to defeasance on non-payment of any quarterly premium, no question arose as to the revival of the policy by payment during the days of grace,

INSURANCE, LIFE—*continued.*
but that the policy was prevented from lapsing by such a payment, and that the plaintiff was entitled to recover.
Pritchard v. *Merchants' Life Assurance Society*, (1858) 3 C. B. (N.S.) 622, distinguished. STUART *v.* FREEMAN - - - - C. A. 47

—— Mortgages of policies—Equitable interests—Notice—Priorities—Bankruptcy 151
See MORTGAGE. 2.

—— Premium on—Income—Deductions - 514
See REVENUE. 7.

INSURANCE, MARINE—*Constructive Total Loss—Policy on Ship—Cost of Repair—Value of Wreck.*
By a policy of marine insurance a ship thereby insured was valued at 23,000*l.*, and that sum was to be taken to be the "repaired value," in ascertaining whether the vessel was a constructive total loss. The ship ran upon rocks off the coast of Sicily, and the owner thereupon gave notice of abandonment, which was not accepted by the underwriters. A salvage association, acting by the consent, and for the benefit, of all parties concerned, got the ship off, and she was temporarily repaired, so as to enable her to be brought to an English port. The shipowner having brought an action on the policy, claiming as for a constructive total loss, the judge at the trial found that, if the ship were permanently repaired, the total cost of repairs would amount to 22,559*l.*, and he refused to take into consideration the value of the wreck. He therefore held that there was not a constructive total loss of the ship:—
Held (by Vaughan Williams L.J., Stirling L.J., and Mathew L.J., the first mentioned doubting), that the shipowner was not entitled to add the value of the wreck to the cost of repair, in determining whether there was a constructive total loss of the ship.
Dictum in *Young* v. *Turing*, (1841) 2 Man. & G. 593, at p. 601; 58 R. R. 477, 484, not followed. ANGEL *v.* MERCHANTS' MARINE INSURANCE COMPANY - - - - C. A. 811

2. —— "*General Average payable according to Foreign Statement*" — *Special Provision in Charterparty as to General Average — Foreign Law.*
The plaintiff, a shipowner, effected with underwriters a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up." The plaintiff chartered the ship to third persons and by the terms of the charterparty it was provided that the ship might carry a deckload of timber, and that "In case of average . . . . jettison of deck cargo for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deckload, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was there made up, and the average adjuster, in accordance with the terms of the charterparty, included the jettison of deck cargo in general average. By the Belgian law, apart from any special provisions in the charterparty, the jettison of deck cargo would not be the subject of general average:—
Held, that, assuming that under the words "general average payable according to foreign statement" the underwriters did not intend to be bound by the foreign statement unless it was made up in accordance with the law of the foreign country—a question which the judge held it unnecessary to decide,—the statement was in accordance with the Belgian law, inasmuch as that law recognised the express provisions of the charterparty, and that the underwriters were bound to indemnify the plaintiff against the ship's proportion of the loss on the jettison of the deck cargo. DE HART *v.* CAMPAÑIA ANONIMA DE SEGUROS "AURORA" - - Kennedy J. 109

3. —— *Policy*—"*Restraint of Princes and People*"—*Prohibition against Entry into Country of Diseased Cattle—Warranty against "Capture, Seizure, and Detention"—Operation on Clause as to Restraint.*
The operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is a "restraint of princes or people" within the meaning of a Lloyd's policy of marine insurance.
A warranty in a policy of marine insurance against "capture, seizure, and detention" operates to release the insurers from liability under the words "arrests, restraints, and detainments of kings, princes, and people" in the body of the policy.
Appeal from the judgment of Bigham J., [1902] 2 K. B. 694, dismissed. MILLER *v.* LAW ACCIDENT INSURANCE COMPANY - C. A. 712

4. —— *Reinsurance—Constructive Total Loss—"To pay as may be paid thereon"—Suing and Labouring—Salvage Charges.*
Shipowners insured their ship with the plaintiffs for a voyage against partial as well as total loss, the sound value of the ship being expressed in the policy to be agreed at a specified sum. The plaintiffs reinsured with the defendant against the risk of total or constructive total loss only, the ship being valued as per original policy. The policy of reinsurance was in the form of an ordinary Lloyd's policy, containing in print the usual undertaking by the assurers to contribute to suing and labouring charges. It also contained in writing the following clauses: "Being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; and, "No claim to attach to this policy for salvage charges." During the course of the insured voyage the ship stranded and suffered damage. The probable cost of getting her afloat, taking her to a port of repair, and repairing her exceeded the agreed value of the ship as expressed in the policy, but as it was in fact less than her real repaired value the owners elected not to give notice of abandonment. The ship was floated and placed in a condition of safety, and subsequently taken to a port of repair and repaired. The owners recovered from the plaintiffs upon their policy 107*l.* per cent. of their proportion of the agreed value of

INSURANCE, MARINE—*continued.*

the ship, that sum being made up partly of the expense of repairs and partly of the expense of floating her. The plaintiffs then sued the defendant for the full amount underwritten by him as in respect of a constructive total loss, or in the alternative for his proportion of the suing and labouring charges:—

Held, (1.) that, there being, in the absence of a notice of abandonment by the owners, no original liability upon the plaintiffs to pay as for a constructive total loss, the mere fact that they had paid, in respect of a partial loss and suing and labouring charges combined, upwards of 100*l.* per cent. did not entitle the plaintiffs to recover that sum from the defendant as for a constructive total loss under the words "to pay as may be paid thereon"; and (2.) that the clause providing that no claim was to attach for "salvage charges" excluded the defendant's obligation to contribute to the suing and labouring charges, notwithstanding the omission to delete the printed clause imposing that obligation.

Uzielli v. *Boston Marine Insurance Co.*, (1884) 15 Q. B. D. 11, discussed. WESTERN ASSURANCE COMPANY OF TORONTO *v.* POOLE **Bigham J. 376**

5. —— *Round Voyage by Stages—Warranty of Seaworthiness, Breach of—Steamship insufficiently provided with Coal—Burning Ship's Fittings and Cargo—Negligence of Master—"Held Covered" Clause in Policy—Fixing Amount of Premium after Breach of Warranty.*

The plaintiffs insured their steamship with the defendants for a round voyage from the United Kingdom to port or ports on the West Coast of South Africa and back again, with leave to call at any ports or places on the east coast of South America, &c. The insurance included general average. The perils insured against were of the seas, &c., subject to clauses annexed to the policy which provided (inter alia): "This insurance also to cover loss through the negligence of the master," &c., and "Held covered in case of any breach of warranty, &c., at a premium to be hereafter arranged." During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. Her coal supply failing between Monte Video and St. Vincent, the master burnt as fuel some of the ship's fittings, spars, and some of the cargo, and if he had not done so she would have been in danger of becoming a total loss. The plaintiffs did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient coal, and no premium had been arranged under the "held covered" clause. In an action on the policy to recover in respect of the loss of the fittings, spars, and cargo:—

Held, that an implied warranty of seaworthiness existed when the ship left Monte Video, and that there was a breach of that warranty in not there providing her with sufficient coal; so that the policy then ceased to attach to the risks insured against:

Also, that the clause with respect to loss through the negligence of the master did not apply, because his negligence was not the proximate cause of the loss;

And that the implied warranty of seaworthiness was a warranty to which the "held covered" clause applied; but that, as the premium which the defendants might reasonably have charged if they had known of the breach of warranty before the loss occurred was at least equal to the amount of the loss, the plaintiffs were not entitled to recover anything. GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY **Bigham J. 367**

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INTOXICATING LIQUOR—Sale of, to children—Vessel not properly sealed—Evidence
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INVESTMENT—Breach of trust—Bankruptcy of trustee—Proof against bankrupt's estate
See BANKRUPTCY. 5. **439**

JUDICATURE ACTS—Charging order—Jurisdiction—Application to enforce charge by order for sale of shares - **534**
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—— County court—Jurisdiction—Claim for injunction only - - - **544**
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—— Trustee, Plaintiff suing as—Unliquidated damages due to defendant from cestui que trust—Equitable defence - **549**
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JUDGMENT—Charging order—Jurisdiction—Application to enforce charge by order for sale of shares - - - **534**
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—— Receiver, Appointment of—Discreet of Court of Session in Scotland—Certificate registered in High Court - - **760**
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JURISDICTION—Chancery taxing masters—Taxation—Costs of inquiry under Lands Clauses Act - - - **231**
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—— Charging order—Application to enforce charge by order for sale of shares **534**
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—— County court—Claim for injunction only
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—— Justices—Bastardy laws - - **177**
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—— Music, Seizure of pirated copies of—Summons, Necessity for - - **275**
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—— Summary jurisdiction—Conviction insufficiently describing offence—Conspiracy and Protection of Property Act - **56**
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JURISDICTION—*continued.*

—— Summary jurisdiction—Costs—Information under Acts relating to revenue - 209
See CROWN.

—— Summary jurisdiction—Register of convictions in Court of—Evidence - 895
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JUSTICES — *Evidence — Previous Conviction — Register of Convictions in Court of Summary Jurisdiction—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 22—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Jurisdiction—Conviction for Drunkenness—Notice to Police—Consent of Defendant—Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-s.* 1—*Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 6, *sub-s.* 1.

The register of the minutes or memorandum of convictions of a Court of summary jurisdiction which has to be kept under s. 22 of the Summary Jurisdiction Act, 1879, by the clerk of the Court is admissible in evidence to prove a previous conviction of the defendant for a similar offence in the same Court.

The consent of the defendant to be tried summarily under s. 2 of the Inebriates Act, 1898, is necessary before a magistrate can make an order under s. 6, sub-s. 1, of the Licensing Act, 1902. COMMISSIONER OF POLICE *v.* DONOVAN **Div. Ct. 895**

—— Bastardy laws—Jurisdiction - - 177
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—— Betting, Place used for—Bar of public-house - - - - 30
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—— Conviction insufficiently describing offence—Conspiracy and Protection of Property Act - - - 56
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—— Crown—Prerogative—Costs—Information under Acts relating to revenue - 209
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—— "Drain"—Semi-detached house—"One building only"—Local Government 44
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—— High treason—Practice—Motion to quash indictment—Expatriation in time of war - - - - - 444
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—— Milk—Inspector of nuisances—Powers—Sample procured outside inspector's district - - - - - 24
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—— Music, Seizure of pirated copies of—Summons, Necessity for - - 275
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—— Poor law — Settlement — Residence — "Hospital" - - - - 19
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—— Poor-rate—Appeal, Notice of—Special Sessions—Parish Council - - 39
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—— Street—Paving expenses—"Owner"
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—— Street—Res judicata—Estoppel - 417
See STREETS. 3.

—— Street—Right to question apportionment of expenses—Frontager - - 169
See STREETS. 1.

LANDLORD AND TENANT — *Agreement for Tenancy—Failure as Present Demise—Operation as Agreement for Future Lease—Specific Performance.*

The agent of the owners of a house signed a document by which he purported to "have let" the house to the defendant at a weekly rental, and which continued: "I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return to him the 6*l.* he has paid me on taking possession of the house." The plaintiffs, treating the defendant as a weekly tenant, gave him notice to quit, and brought this action to recover possession of the house:—

Held, that the document could not, having regard to its terms, be treated as creating a weekly tenancy, and that whether it purported to be an attempt to create an immediate demise for the life of the defendant, which was void at law as not being by deed, or an agreement to grant a lease for the life of the defendant, he was entitled to specific performance.

Browne v. *Warner*, (1807) 14 Ves. 156, 409; 9 R. R. 259, and *Parker* v. *Taswell*, (1858) 2 De G. & J. 559, followed.

Cheshire Lines Committee v. *Lewis*, (1880) 50 L. J. (Q.B.) 121, considered. ZIMBLER *v.* ABRAHAMS - - - - **C. A. 577**

2. —— *Lease—Covenants—Power to Lessee to determine Lease on Notice given—Avoidance of Covenants—Omission to reserve Lessor's Rights—Liability of Lessee for past Breaches of Covenant.*

A lease for fourteen years provided that the lessees should have power to determine the lease at the end of the first seven years upon giving six months' notice in writing, and that "in such case this present indenture and every clause, matter, and thing herein contained shall, upon the expiration of the said notice, cease and determine and be void, anything hereinbefore contained to the contrary notwithstanding"; the proviso, however, did not contain the usual reservation of the lessor's rights in respect of existing breaches of the lessees' covenants:—

Held, that, upon the determination of the lease by the lessees under the above power, the lessor was entitled to sue them for existing breaches of their covenants notwithstanding that his right to do so was not expressly reserved. BLORE *v.* GIULINI - - **Wright J. 356**

3. —— *Lease—"Outgoings"—Tenancy for Three Years—Agreement by Tenant to pay Outgoings—Order by Sanitary Authority to reconstruct Drain—Liability of Tenant.*

The plaintiff let a house to the defendant for a term of three years, the tenant agreeing to pay all "outgoings payable in respect of the premises." During the tenancy the plaintiff, in

LANDLORD AND TENANT—*continued.*

obedience to an order from the sanitory authority, reconstructed the drainage system of the house:—

Held, that the shortness of the term was no reason for putting a more limited construction upon the expression "outgoings" than that which would have been put upon it in a lease for a longer period, and that the defendant was liable under his agreement to recoup the plaintiff the expense of the drainage work.

Decision of Farwell J. in *Valpy* v. *St. Leonards Wharf Co.*, (1903) 1 L. G. R. 305, distinguished. STOCKDALE *v.* ASCHERBERG - **Wright J. 873**

4. —— *Lease—Outgoings, Covenant by Lessee to pay and bear—Private Street Works—Expenses charged on Premises before Commencement of Term—Completion of Works—Final Apportionment—Private Street Works Act*, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 12, 14.

Where by a covenant in a lease the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises, or the owner or occupier in respect thereof:—

Held (reversing the judgment of Walton J.), that the covenant did not apply to expenses of private street works which, under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date.

Stock v. *Meakin*, [1900] 1 Ch. 683, followed. SURTEES *v.* WOODHOUSE - - **C. A. 396**

5. —— *Lease—Quiet enjoyment, Covenant for—Underlease—Implied Covenant—Implication arising from the Word "Let"—Lawful Interruption by Person claiming under Title Paramount.*

By an agreement, not under seal, operating as an immediate demise, the defendant agreed to "let" to the plaintiff certain premises for the term of three years. The defendant was himself a lessee of the premises, which, by the terms of the lease to him, were subject to a restrictive covenant, of which the plaintiff had no notice, as to carrying on any business thereon. The plaintiff entered into possession, and carried on his business on the premises until restrained by an injunction obtained by the superior landlord. In an action for breach of contract for quiet enjoyment:—

Held, that, whether or not any contract for quiet enjoyment could be implied from the word "let," the use of that word did not create an unrestricted contract for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount, and that the plaintiff was not entitled to recover.

Baynes & Co. v. *Lloyd & Co.*, [1895] 2 Q. B. 610, considered. JONES *v.* LAVINGTON **C. A. 253**

6. —— *Lease—Renewal "at Costs of Lessee"—Costs of Reference and Award as to Amount of Fine payable on Renewal—Arbitration.*

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term on payment of a fine calculated (in part) upon the full improved annual value of the premises at the time of renewal, such value to be determined by the landlord's surveyor or, at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held (reversing the judgment of Wright J., [1902] 1 K. B. 512), that the costs of the reference and award were payable by the lessee under the covenant, as necessary costs of the renewal. LORD MOSTYN *v.* FITZSIMMONS - **C. A. 349**

LANDS CLAUSES ACTS—*Compensation—Lands Injuriously Affected—Interest created after Notice to Treat—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 18, 68.

The principle that an interst in land the subject of a notice to treat, created subsequently to the date of the notice, cannot form the subject of compensation under the Lands Clauses Consolidation Act, 1845, applies also to adjoining lands of the same landowner which are injuriously affected by the execution of the works of the promoters. After service of a notice to treat no onerous interest, either in land taken or in land injuriously affected, can be created by the landowner to the prejudice of the promoters.

Decision of Lord Alverstone C.J., [1901] 2 K. B. 753, reversed. MERCER *v.* LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY - - - - **C. A. 652**

2. —— *Costs—Practice—Taxation—Costs of Inquiry under Lands Clauses Act—Chancery Taxing Masters—Jurisdiction—Lands Clauses Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 52—*Lands Clauses* (*Taxation of Costs*) *Act*, 1895 (58 *&* 59 *Vict. c.* 11)—*Rules of January*, 1902, *pursuant to Supreme Court of Judicature* (*Officers*) *Act*, 1879 (42 *&* 43 *Vict. c.* 78).

The Chancery taxing masters, whose office is amalgamated with, and who are themselves transferred to, the Central Office by virtue of the General Rules pursuant to Supreme Court of Judicature (Officers) Act, 1879, which came into operation on January 11, 1902, have now jurisdiction to tax the costs of an inquiry before a jury under the Lands Clauses Act, 1845. COVINGTON *v.* METROPOLITAN DISTRICT RAILWAY COMPANY - - - - - **Div. Ct. 231**

LEASE.
See under LANDLORD AND TENANT.

LICENSING ACTS—Inebriates Act—Consent of defendant - - - - **895**
See JUSTICES.

LIEN—Charterparty—Freight—Lien on subfreight - - - - **391**
See SHIPPING. 4.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHTERMEN—Negligence of carrier's servants—Liability - - - - **750**
See CARRIER. 2.

LIMITATIONS, STATUTE OF—*Devise of Land in Trust for Sale—Mortgage of Reversionary Interest in Proceeds—Action on Covenant in Mortgage Deed—"Money charged upon or payable out of Land"—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A testatrix died having devised her real estate to trustees in trust for A. for life, and after A.'s death in trust to sell and divide the proceeds among the defendants. The defendants joined in executing a mortgage of their reversionary interest in the property to the plaintiff to secure an advance. The mortgage deed contained a joint and several covenant to repay the loan with interest. More than twelve years and less than twenty years after the last payment of interest or acknowledgment by the defendants the plaintiff brought his action to recover the amount of principal and interest due under the covenant in the mortgage deed. A. was still living at the date of the action:—

Held, that the money payable under the covenant was money "charged upon or payable out of land" within the meaning of s. 8 of the Real Property Limitation Act, 1874, and that the limitation of twelve years imposed by that section applied to the personal action upon the covenant, even though the subject-matter of the mortgage was a reversion, and though that reversion had not yet fallen into possession at the date of the action. KIRKLAND *v.* PEATFIELD **Wright J. 756**

2. —— *Simple Contract Debt—Acknowledgment of Debt—Special Promise to Pay.*

Where, in an action commenced in 1902 upon a promissory note given by the defendant to the plaintiff in 1881, for 100*l.* with interest, payable on demand, it was proved that the defendant had in 1901 written a letter, in which, after asserting that there had been certain payments by him on account of the note, he used expressions importing that he was willing that an account should be taken between himself and the plaintiff, and that he would pay what was thereupon found to be due, and it was found on the trial that no payments had been made on account of the note:—

Held, affirming the judgment of Bruce J., that the letter afforded sufficient evidence of a new promise to take the case out of the Statute of Limitations. LANGRISH *v.* WATTS **C. A. 636**

LIQUIDATOR—Power to compromise action—Extraordinary resolution - - **477**
See COMPANY. 2.

LOCAL GOVERNMENT—*Creation of Urban District—Subtraction of Parish from Rural District—Highway Expenses—Loss of Income—Matter requiring Adjustment—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 54.

Where, by order of a county council under s. 57 of the Local Government Act, 1888, a parish, which had previously formed part of a rural district, was separated from that district and constituted an urban district, and the contributions of that parish to the highway expenses of the rural district had exceeded the expense of the repair of the highways in the parish:—

Held, that the loss of income occasioned to the rural district council by the subtraction of that parish from their district constituted a matter requiring adjustment under s. 62 of the Local Government Act, 1888.

In re Rochdale Union and Haslingden Union, [1899] 1 Q. B. 540, followed. IN THE MATTER OF GODSTONE RURAL COUNCIL AND CATERHAM URBAN COUNCIL - - - **C. A. 554**

—— Poor-rate — Appeal, Notice of — Special sessions—Parish council - - **39**
See RATES.

—— Sewers.
See under SEWERS.

—— Streets.
See under STREETS.

LONDON—"*Sewer*"—*Drain—Drain receiving Drainage from more than one Building—Rain Water — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Where a drain was used for drainage of two adjoining houses, not being a drain for the drainage of a block of houses by a combined operation under the order of a vestry or district board:—

Held, that it was a "sewer" within the definition given by s. 250 of the Metropolis Management Act, 1855, although from one of the houses it carried away rain water only. SILLES *v.* FULHAM BOROUGH COUNCIL - **C. A. 829**

2. —— *Street—Paving Expenses—"Owner"—Building Agreement—New Street—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

The owner in fee of land made an agreement with a builder whereby it was agreed that the builder might enter upon the land and should build houses thereon, and that a lease should be granted of each house when erected, and that the builder should in the meantime pay 200*l.* a year (which was not a rack-rent) until the leases were granted, and that "this agreement is intended to operate as an agreement only and not as an actual demise of the premises, or to give the intended lessee any legal interest therein until the leases hereinbefore agreed to be granted shall have been executed." The land had not been used, and no houses had been erected by the builder:—

Held, that the builder was not the owner of the land within the meaning of s. 250 of the Metropolis Management Act, 1855.

Holland v. *Kensington Vestry*, (1867) L. R. 2 C. P. 565, followed. DRISCOLL *v.* BATTERSEA BOROUGH COUNCIL - - - **Div. Ct. 881**

3. —— *Street—Paving Expenses—"Owner"—Rack-Rent—Public Recreation Ground—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

By virtue of a scheme certified by the Inclosure Commissioners, pursuant to the Metropolitan Commons Act, 1866, and afterwards confirmed by the Metropolitan Commons (Supplemental) Act, 1873, a common was vested in the Metropolitan Board of Works, whose successors are the London County Council, for the purpose of being dedicated to the public as a recreation ground. By the scheme it was provided that the common should be regulated and

LONDON—*continued.*

managed by the Board, and that no house or other buildings should be erected on it, except such lodges or other buildings as might be necessary for the maintenance or management of the common or recreation ground. The county council derived small annual profits from the herbage on the common and from certain buildings erected thereon for purposes subsidiary to its use as a public recreation ground, but the expenses annually incurred by the county council in the management and regulation of the common far exceeded the amount of any profits so received by them. The Wandsworth Borough Council claimed from the London County Council, as owners of the common, a sum of 319*l.* as their proportion of the estimated expenses of paving a new street, on which the common abutted to the extent of 474 feet, under the Metropolis Management Act, 1855, s. 105, and the Metropolis Management Amendment Act, 1862, s. 77:—

Held, that the London County Council were not "owners" of the common within the definition of the word "owner" contained in the Metropolis Management Act, 1855, s. 250, and therefore they were not liable to pay the amount claimed.

Fulham Vestry v. *Minter*, [1901] 1 K. B. 501, overruled. LONDON COUNTY COUNCIL *v.* WANDSWORTH BOROUGH COUNCIL - - **C. A 797**

—— Gas—Arrears of gas rate—Right to recover from incoming tenant - - 593
See GAS.

MACHINERY—Trade fixtures—Hire-purchase agreement—Entry of mortgagee into possession - - - - 87
See FIXTURES.

MANCHESTER CORPORATION—Income tax—Salary—Deductions—Contribution to thrift fund - - - - 517
See REVENUE. 8.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See Cases under EMPLOYER AND WORKMAN.

MEDICAL ATTENDANCE—Expenses of—Seaman injured in service of ship - 589
See SHIPPING. 7.

MERCHANT SHIPPING ACT.
See under SHIPPING.

METROPOLIS.
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MISCONDUCT—Solicitor—Inquiry—Necessity of appearing by counsel - - 857
See SOLICITOR. 2.

MILK—Inspector of nuisances—Powers—Sample procured outside inspector's district 24
See ADULTERATION.

MINES — *Clay — Compulsory Purchase — Mines and Minerals — Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.

Clay forming the surface or subsoil, and constituting the "land" compulsorily taken for the purposes of an undertaking, is not a mineral within the meaning of ss. 77, 78, or 79 of the Railways Clauses Consolidation Act, 1845.

Lord Provost of Glasgow v. *Farie*, (1888) 13 App. Cas. 657, explained.

Hext v. *Gill*, (1872) L. R. 7 Ch. 699, and *Jersey (Earl)* v. *Neath Guardians*, (1889) 22 Q. B. D. 555, commented on.

Great Western Ry. Co. v. *Blades*, [1901] 2 Ch. 624, approved. *In re* TODD, BIRLESTON & CO. AND NORTH EASTERN RAILWAY COMPANY **C. A. 603**

MONEY-LENDER—Receiving order—Debt to money-lender—Power of Court to reopen transaction - - - - 705
See BANKRUPTCY. 6.

MORTGAGE — *Consolidation — Bankruptcy — Several Mortgages on same Property—First Mortgage reserving Right of Consolidation — Third Mortgage including other Property — Claim to redeem third Mortgage only—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 17.

Three mortgages of the same property were granted by the same mortgagor to three different parties, the third mortgage also including other property. Only the first mortgage contained a clause reserving a right of consolidation. On the bankruptcy of the mortgagor, the second mortgagee took transfers of the first and third mortgages:—

Held, that the trustee in bankruptcy could not redeem the third mortgage without also redeeming the first and second mortgages. *In re* SALMON. *Ex parte* THE TRUSTEE **Wright J. 147**

2. —— *Priorities—Bankruptcy—Mortgages of Policies—Equitable Interests—Notice.*

A solicitor entrusted by a client with money to invest misappropriated it. Afterwards he executed a mortgage of certain life policies in favour of the client to secure part of the money misappropriated, but did not inform the client of the existence of the mortgage nor give notice of it to the insurance offices. Subsequently, he made a second mortgage of the same policies to a clerk in his office as a trustee for other clients whom he had defrauded, but did not disclose the first mortgage. The second mortgagee gave notice to the insurance offices. On the bankruptcy of the solicitor the first mortgage was discovered, and notice of it was at once given to the insurance offices:—

Held, that the second mortgagee was entitled to priority over the first mortgagee. *In re* LAKE. *Ex parte* CAVENDISH - - **Wright J. 151**

—— Contributory—Breach of trust—Bankruptcy of trustee — Proof against bankrupt's estate - - - - 439
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—— Reversion—Real Property Limitation Act
See LIMITATIONS, STATUTE OF. 1. **756**

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See SHIPPING. 6.

—— Stamp—Trust deed for securing debenture stock - - - - - - 689
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—— Trade fixtures—Hire-purchase agreement—Entry of mortgagee into possession 87
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MUSIC—Seizure of pirated copies of—Order of Court of summary jurisdiction—Summons, Necessity for - - 275
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MUNICIPAL CORPORATION.
See under CORPORATION.

NATURALIZATION—High treason—Motion to quash indictment—Expatriation in time of war - - - - 444
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NEGLIGENCE—Architect—Preparing plans—Plans not used—Nominal damages 244
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—— Carrier's servants—Liability—Lighterman—Contract - - - - 750
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—— Dangerous goods—Knowledge of vendor—Duty of vendor to purchaser - 155
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NOTICE—Appeal—Poor-rate—Special sessions—Parish council - - - - 39
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—— Bankruptcy notice, Right of creditor to issue fresh—Security given to satisfaction of creditor - - - 33
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—— Mortgages of policies—Equitable interests—Priorities—Bankruptcy - 151
See MORTGAGE. 2.

OUTGOINGS—Covenant by lessee to pay—Private street works - - - 396
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"**OUTGOINGS**"—Drain, Order by sanitary authority to reconstruct—Liability - 873
See LANDLORD AND TENANT. 3.

"**OWNER**"—Street—Paving expenses 797, 881
See LONDON. 2, 3.

PARISH COUNCIL—Poor-rate—Notice of appeal—Special sessions—Parish council 39
See RATES.

PARLIAMENTARY AGENT—Costs—Taxation—Solicitor - - - - 189
See SOLICITOR. 1.

PARTNERSHIP—*Practice—Partners—Action against Partner in Name of Firm—Execution against Person as Member of Firm—Issue to determine Liability—"Was or has held himself out as Partner in Firm"—Rules of Supreme Court, Order XLVIII. a, r. 8.*

In an action against the defendant firm, appearance was entered by one person as having been sued in the firm's name. Judgment was entered against the firm, and the plaintiff applied for a summons under Order XLVIII. *a*, r. 8, to determine whether another person was liable to have execution issued against him on the judgment:—

Held, that an order for an issue, in which the question should be whether that person "was or had held himself out as a partner in the defendant firm," was rightly made. DAVIS *v.* HYMAN & Co. - - - - - C. A. 854

2. —— *Principal and Agent—Scope of Authority—Tortious Act of one Partner—Liability of Firm—Bribing Servant to disclose Employer's Secrets—Partnership Act*, 1890 (53 & 54 *Vict.* c. 39), *s.* 5.

Where it was in the course of the business of the defendants, a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, and one of the partners obtained such information by bribing a clerk of the plaintiff, a competitor in business, to break his contract of service by dishonestly and improperly communicating to him knowledge obtained in the course of the clerk's employment:—

Held, that both the partners were responsible in damages to the plaintiff for the action of one of them as aforesaid, on the ground that it was within the general scope of the authority given to him as a partner to conduct the business of the firm. HAMLYN *v.* JOHN HOUSTON & Co. C. A. 81

PAVING EXPENSES—Street—"Owner" 797, 881
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PAYMENT INTO COURT—Life insurance company—No sufficient discharge otherwise obtainable - - - - 184
See INSURANCE, LIFE. 1.

—— With denial of liability—Costs—Discretion of judge - - - - 358
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PLAN—Negligence of architect in preparing plans—Plans not used—Nominal damages - - - - 244
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POLL—Demand of, What amounts to - 668
See CORPORATION. 1.

POOR LAW—*Settlement—Irremovability—Residence—"Hospital"—Poor Removal Act*, 1846 (9 & 10 *Vict.* c. 66), *s.* 1.

An institution partially endowed by a private person and founded with the object of providing a home and medical treatment, together with suitable employment and recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within the proviso to s. 1 of the Poor Removal Act, 1846. ORMSKIRK UNION *v.* CHORLTON UNION - - Div. Ct. 19

—— Bastardy laws—Jurisdiction of justices 177
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POOR-RATE.
See under RATES.

PRACTICE—*Appeal—Order whether Final or Interlocutory—Order to try Preliminary Question of Liability—Action dismissed—Contract, Breach of.*

An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the plaintiff appealed:—

Held, that the appeal was from a final order.

Shubrook v. *Tuffnell*, (1882) 9 Q. B. D. 621, followed. BOZSON *v.* ALTRINCHAM URBAN DISTRICT COUNCIL - - - - - **C. A. 547**

2. —— *Charging Order—Interest in Shares charged with Judgment Debt—Application to enforce Charge by Order for Sale of Shares—Jurisdiction—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 24—*Rules of Supreme Court, Order* XLVI., *r.* 1—*Leave for Service out of Jurisdiction—Action to enforce Charging Order—Rules of Supreme Court, Order* XI., *r.* 1 (*e*)—*Judgments Act,* 1838 (1 & 2 *Vict. c.* 110), *ss.* 14, 15.

Where an order has been made charging a judgment debtor's interest in shares with the amount due on the judgment under the Judgments Act, 1838, that order cannot, under s. 24 of the Judicature Act, 1873, be enforced by an order made in the original action.

Leggott v. *Western*, (1884) 12 Q. B. D. 287, followed.

Leave cannot be given for service of a writ out of the jurisdiction under Order XI., r. 1 (*e*), in an action to enforce such a charging order. KOLCHMANN *v.* MEURICE - - **C. A. 534**

3. —— *Costs—Detinue—Action founded on Tort—Return during Progress of Case of Articles claimed—Rights of Parties at Date of Writ—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-s.* 2.

The plaintiff brought an action in the High Court to recover from the defendants certain drawings that had been deposited with them as agents for sale, and damages for their detention, and he claimed also an account in respect of such of the drawings as had been sold, and the amount that might be proved to be due on the taking of the account. The defendants pleaded that they had always been ready and willing to return the drawings in their possession, and offered to return them forthwith on obtaining a proper receipt. The plaintiff replied accepting the offer to return the drawings, and they were accordingly returned to him. They were of the value of 20*l.* and upwards. The action went to trial on the question of the amount due from the defendants in respect of the drawings that had been sold, and resulted in a verdict for the plaintiff for 33*l.*:—

Held, that the plaintiff was entitled to costs on the High Court scale on the grounds (1) that he had recovered the drawings through the exigency of the writ, and that the return of them during the progress of the case did not affect the rights of the parties at the date of the writ; and (2) that, the action being one of detinue in which the plaintiff had recovered the things claimed in specie, it was not within the class of actions founded on tort to which s. 116, sub-s. 2, of the County Courts Act, 1888, applies. DU PASQUIER *v.* CADBURY, JONES & CO. - - **C. A. 104**

4. —— *Costs—Two Defendants jointly represented—Judgment for one Defendant and against the other—Plaintiff liable to pay half the Costs of the Defence.*

Where two defendants are jointly represented by the same solicitor, and judgment with costs is given in favour of one defendant and against the other, the successful defendant is, in the absence of any agreement between him and his co-defendant as to how their costs are to be borne inter se, entitled to recover from the plaintiff half the costs of the defence. BEAUMONT *v.* SENIOR AND BULL - - **Div. Ct. 282**

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—— Costs—Lease—Renewal "at costs of lessee"—Award - - - - 349
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—— Costs—Payment into court with denial of liability - - - - 358
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—— Equitable defence—Plaintiff suing as trustee—Unliquidated damages due to defendant from cestui que trust - - 549
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—— Indictment, Motion to quash—High treason—Expatriation in time of war—Naturalization - - - - 444
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—— Staying proceedings — "Submission" — Agreement to refer disputes to foreign Court - - - - 249
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PREROGATIVE—Crown — Costs — Information under Acts relating to revenue - 209
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PRINCIPAL AND AGENT—Advertising property for sale—Slander of title—Auctioneer cast in damages—Liability of principal
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PRIORITY—"Costs of petitioning creditor"—Trustee's solicitors' costs - - 735
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—— Mortgages of policies—Equitable interests—Notice - - - - 151
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PRIVATE STREET WORKS—Covenant by lessee to pay outgoings - - - 396
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QUIET ENJOYMENT—Covenant for—Implication arising from the word "let" 253
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RAILWAY—*Contract of Carriage—Conveyance of Goods by Passenger Train—Collection and Delivery—Inclusive Charge for Carriage and Collection of Goods—Special Act—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.

A schedule of the statutory maximum rates and charges authorized to be taken by a railway company for the conveyance of goods contained a provision that the company should not be under obligation to carry non-perishable goods by passenger train. The company announced to the public their willingness to carry tailors' clothing by passenger train at a "collected and delivered" rate specified in a scale of charges which they published. The plaintiffs, who were common carriers at Bristol, sent parcels of tailors' clothing from Bristol to Southampton by the company's passenger train, having themselves collected the goods at Bristol and handed them over to the company at their passenger station. The plaintiffs paid to the company, under protest, the scale charge; and brought an action against them for money had and received, claiming to be entitled to a rebate from the defendants in respect of the collection of the goods at Bristol:—

Held, that the plaintiffs were not entitled to any rebate, and that the action was not maintainable. STONE & CO. *v.* MIDLAND RAILWAY COMPANY - - - - Div. Ct. 741

—— Clay—Compulsory purchase—Mines and minerals - - - - 603
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RATES—*Appeal—Special Sessions—Notice of Appeal—Parish Council—Poor-rate—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 6—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 6, *sub-s.* 1, *and s.* 52, *sub-s.* 5.

Where, upon a poor-rate being made in a rural parish having a parish council, an appeal against the rate is brought to special sessions under s. 6 of the Parochial Assessment Act, 1836, it is now, since the passing of the Local Government Act, 1894, a condition precedent to the jurisdiction of the justices to hear the appeal that the appellant should have given notice of appeal to the parish council. THE KING *v.* TEWKESBURY JUSTICES Div. Ct. 39

—— Arrears of gas rate—Right to recover from incoming tenant - - - 593
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RECEIVER—*Appointment of Receiver—Practice—Decreet of Court of Session in Scotland—Certificate registered in High Court—Equitable Execution—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.

An appointment of a receiver by way of equitable execution may be made upon the certificate of a decreet of the Court of Session in Scotland registered in the High Court under the Judgments Extension Act, 1868. THOMPSON *v.* GILL C. A. 760

RECEIVING ORDER—Debt to money-lender—Power of coupon transaction - 705
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RENEWAL — Lease — Renewal "at costs of lessee"—Award - - - 349
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RES JUDICATA—Streets—Private street works—Estoppel - - - - 417
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REVENUE—*Estate Duty—Gift of Personal Property—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

In view of the approaching marriage of the defendant it was agreed between his father and the bride's father that the latter would settle 20,000*l.* on his daughter, on condition that the defendant's father would give to the defendant 10,000*l.* That sum was accordingly paid to the defendant by his father, and a settlement of the 20,000*l.* was executed, and the marriage subsequently took place. The defendant's father died within twelve months of the date of payment:—

Held, that estate duty was payable by the defendant on the 10,000*l.* under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

Attorney-General v. *Worrall*, [1895] 1 Q. B. 99; *Attorney-General* v. *Johnson*, [1903] 1 K. B. 617, followed. Attorney-General *v.* Holden
Ridley J. 832

2. —— *Estate Duty — Property passing on Death—Principal Value — Mortgage in Fee by Tenant for Life and Remaindermen—Tenant for Life indemnified against Mortgage Debt—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-ss.* 1, 7.

In May, 1888, the Ditton estate stood limited to the Dowager Duchess of Buccleuch for life, and, after her death, to such uses as Lord Montagu and his eldest son should jointly appoint, and, in default of and subject to such appointment, to Lord Montagu for life, with remainders over. By deed of May 29, 1888, the Dowager Duchess, Lord Montagu, and his eldest son concurred in granting and appointing the fee by way of mortgage to secure payment with interest of 27,000*l.*, advanced by the mortgagees to Lord Montagu and his eldest son, who alone covenanted to repay the principal and interest. By a further deed of the same date Lord Montagu and his eldest son covenanted to indemnify the Duchess and the Ditton estate during her lifetime against the mortgage debt and interest, and they conveyed and assigned to trustees a yearly sum of 1500*l.* charged on other estates, in which they had a sufficient interest upon trust to keep down the interest on the mortgage, and otherwise to effectuate the indemnity of the Duchess in the manner therein mentioned. The Duchess and the Ditton estate during her lifetime were in fact kept fully indemnified against the mortgage debt and interest. The Duchess died on March 28, 1895:—

Held, reversing the judgment of Phillimore J., [1902] 1 K. B. 429, that, in calculating the value of the estate which passed upon the death of the Duchess for the purpose of estate duty, the mortgage debt of 27,000*l.* must be deducted from the principal value of the Ditton estate. Attorney-General *v.* Lord Montagu - - **C. A. 483**

3. —— *Estate Duty—Succession Duty—Gift to a Charitable Society—Reservation of Annuity to Donor—Bonâ fide Purchase—Partial Consideration—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 3, *sub-s.* 2—*Succession Duty Act,* 1853 (16 & 17 *Vict. c.* 51), *s.* 7.

In 1889 500*l.* was paid to the directors of an unincorporated charitable society, in lieu of a legacy, and upon the terms of a resolution of the directors of the society that the trustees of the society should be authorized to pay to the person from whom the 500*l.* was received, and to his wife if she survived him, an annuity of 25*l.* The annuity was not charged upon or secured by the property of the society, and was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity in the year 1889 was 210*l.* The payer of the 500*l.* and his wife, who survived him, died after the date of the Finance Act, 1894. The Crown claimed that on his death estate duty became payable by the society on the 500*l.* under s. 2, sub-s. 1 (*c*), of the Act; and that on her death succession duty became payable on the 500*l.* under s. 7 of the Succession Duty Act, 1853:—

Held, that the transaction was a gift and not a bonâ fide purchase of an annuity, and that consequently estate duty was payable on the full sum of 500*l.*, without any deduction in respect of the value of the annuity:

Held, also, that, the disposition of the 500*l.* not being a bonâ fide sale, succession duty was payable under s. 7 of the Succession Duty Act, 1853.

Judgment of Phillimore J., [1902] 1 K. B. 416, reversed. Attorney-General *v.* Johnson
C. A. 617

4. —— *House Duty — School Buildings — "Other Offices"*—48 *Geo.* 3, *c.* 55, *Sched. B*—*House Tax Act,* 1851 (14 & 15 *Vict. c.* 36).

The appellant was the occupier of a dwelling-house and premises, which he used for the purposes of a boarding school. He also occupied adjacent buildings, which were separated from the first-mentioned premises by a wall. There was a door in the wall through which, by means of a covered-in passage, there was communication between the premises on each side of the wall. The adjacent buildings were respectively used as a chapel, a gymnasium, class-rooms, fives court, and for such like school purposes in connection with the boarding-school, other than the ordinary purposes of a dwelling-house:—

Held (reversing the judgment of Phillimore J.), that the adjacent buildings must be included in the valuation of the premises for the purposes of inhabited house duty, as being offices belonging

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to and occupied with the dwelling-house within the meaning of rule 2 of Sched. B of 48 Geo. 3, c. 55. Browne *v.* Furtado - - **C. A. 723**

5. —— *Income Tax—"Annuity"—Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts*, 1842, 1853 (5 & 6 *Vict.* c. 35; 16 & 17 *Vict.* c 34), *Scheds. C. and D.*

By a contract, made in 1849, between the East India Company and the Great Indian Peninsula Railway Company, it was agreed that at the expiration of fifty years therefrom it should be lawful for the East India Company, on notice to the railway company, to purchase from them their railway at a price representing the full amount of the value of all the shares or capital stock of the railway company, and that if and when the East India Company should become liable under the contract to pay for the purchase of the railway it should be lawful for them, instead of paying a gross sum therefor, to declare, by notice to the railway company, their option to pay an "annuity," to commence from the time when the gross amount would be payable and to continue during the residue of a term of ninety-nine years, the rate of interest to be used in calculating the annuity to be determined as therein specified. At the expiration of the fifty years the Secretary of State for India, in whom the powers exercisable by the East India Company under the contract had become vested, gave notice to the railway company of his intention to purchase the railway, and the price was determined and became payable. The Secretary of State thereupon duly declared his option to pay an annuity, and the rate of interest to be used in calculating the annuity was duly fixed. The annuity was paid half-yearly, each payment representing, as to a part of it, an instalment of the price paid for the railway, and, as to the residue, interest on the amount of the price for the time being unpaid. This arrangement was sanctioned by a local Act, which provided that the Secretary of State should pay the annuity to certain trustees appointed on behalf of the shareholders of the railway company :—

Held, that so much or each instalment as represented payment of the purchase-money was not within the term "annuity" in Sched. C of the Income Tax Acts, and, therefore, that income tax was not payable upon the whole amount of each half-yearly payment, but only upon so much of it as represented interest.

Judgment of Phillimore J., [1902] 2 K. B. 413, reversed. Scoble *v.* Secretary of State in Council for India - - - **C. A. 494**

6. —— *Income Tax—Company resident in United Kingdom — Holding Preponderating Majority of Shares in Company Abroad—Control —Income Tax Act*, 1842 (5 & 6 *Vict.* c. 35), *s.* 100, *Sched. D, Case* 1.

An English Company carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors, &c., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholder :—

Held, that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax under the first case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the profits of the foreign company.

Judgment of Phillimore J., [1902] 2 K. B. 450, affirmed. Kodak, Limited *v.* Clark **C. A. 505**

7. —— *Income Tax — Deductions — Premium on Life Insurance—Income Tax Act*, 1853 (16 & 17 *Vict.* c. 34), *s.* 54.

The suppliant effected an insurance on his life for 1500*l.* upon the terms that the annual premium should be 66*l.* 17*s.* 6*d.*, and that the insurers should in each year advance to him by way of loan the amount of 33*l.*, and that he should pay interest annually upon amounts so advanced and be personally liable to repay the same, and that the advances and interest thereon should be a first charge upon the policy. In each year the suppliant paid 33*l.* 17*s.* 6*d.* in cash in respect of the premium, and was debited with the remaining 33*l.* as a loan, and he paid interest annually in respect of those loans :—

Held (reversing the judgment of Phillimore J., [1902] 2 K. B. 255), that the above-mentioned transaction did not amount to payment of an annual premium of 66*l.* 17*s.* 6*d.* by the assured within the meaning of s. 54 of the Income Tax Act, 1853, and therefore that the suppliant was only entitled under that section to deduct from the amount of his assessment to income tax the sum of 33*l.* 17*s.* 6*d.* which he had paid in cash. Hunter *v.* The King - - - **C. A. 514**

8. —— *Income Tax — Salary — Deductions — Contribution to Thrift Fund—Sum payable or chargeable by virtue of Act of Parliament—Income Tax Act*, 1842 (5 & 6 *Vict.* c. 35), *s.* 146—*Manchester Corporation Act*, 1891 (54 & 55 *Vict.* c. ccvii.).

A municipal corporation were by a local Act empowered to establish a fund for the encouragement of thrift among their officers and servants, and with a view to providing a sum of money which, in the event of the retirement or death of any person in the service of the corporation, who had contributed to the fund, should be available for himself or his representatives, and to frame a scheme for that purpose. By a scheme framed by the corporation in pursuance of the Act, it was provided that persons in the service of the corporation should respectively contribute to the fund a certain percentage of their salaries, to be from time to time deducted from those salaries by the corporation. In accordance with the requirements of the Act, the scheme provided that the amount so contributed by each contributor should be repaid with interest to him, upon his retirement from the service of the corporation, or, in the event of his death in that service, to his personal representatives :—

Held, that amounts deducted in pursuance of the scheme from the salaries of persons in the

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service of the corporation did not come within the words "sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged," in the first rule of s. 146 of the Income Tax Act, 1842, and therefore they could not be deducted from the amounts of the salaries for the purpose of assessment to income tax under Sched. E.

Beaumont v. *Bowers*, [1900] 2 Q. B. 204, not followed. HUDSON *v.* GRIBBLE. BELL *v.* GRIBBLE **C. A. 517**

9. —— *Stamp — Mortgage — Trust Deed for securing Debenture Stock—Security auxiliary or by way of further Assurance—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *First Schedule,* "*Mortgage, &c.*" (2).

A limited company, upon the issue of debenture stock, by deed entered into with trustees for the holders of the stock, acknowledged that the company was indebted to the trustees to the amount of the stock, and agreed to convey to the trustees certain freehold property, not at the time in the possession of the company, and power was given to the trustees to enforce payment by foreclosure. The company subsequently acquired the property and conveyed it to the trustees upon the trusts and purposes and subject to the provisions of the trust deed. Stamp duty was paid on the trust deed under the 1st schedule to the Stamp Act, 1891, title "Mortgage, &c.," clause 2, on the amount of the debenture stock. The Commissioners assessed the duty on the second deed under the same schedule, clause 2, at 6*d.* per cent. on the amount of the debenture stock. On appeal:—

Held, that the deed of conveyance was liable to the duty assessed by the Commissioners as a mortgage "being an auxiliary security or by way of further assurance" for the repayment of money "where the principal or primary security is duly stamped." BRITISH OIL AND CAKE MILLS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE **C. A. 689**

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SALE OF GOODS—*Negligence—Dangerous Goods —Knowledge of Vendor—Duty of Vendor to Purchaser—Warranty of Fitness—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned of it:—

Held, that, independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger.

Where one of the rules of a co-operative society stated that no warranties were given with goods sold by the society, except on the written authority of one of the managing directors or the assistant manager.

Query, whether the rule had the effect of excluding the implied warranty that an article sold for a particular purpose is fit for that purpose. CLARKE AND WIFE *v.* ARMY AND NAVY CO-OPERATIVE SOCIETY, LIMITED - **C. A. 155**

2. —— *Warranty—Beer sold by Retail—Fitness for Consumption—Implied Warranty—Breach —Damages—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

By s. 14, sub-s. 2, of the Sale of Goods Act, 1893, "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The defendant kept a beerhouse in which the beer supplied to customers, for consumption on the premises, was that of a particular firm of brewers only. This fact was known to the plaintiff, who frequented the beerhouse for the purpose of buying the beer of that firm. The beer contained arsenic, by reason of which the health of the plaintiff was injured. In an action to recover damages for breach of warranty:—

Held, that the beer had been bought by

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description within the meaning of s. 14, sub-s. 2, of the Sale of Goods Act, 1893, and that, as examination by the buyer would not have revealed the defect, the defendant was liable on an implied warranty that the beer was of a merchantable quality. WREN *v.* HOLT **C. A. 610**

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SEWERS — " *Drain* " — *Semi-detached Houses— " One Building only "—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 4.

By s. 4 of the Public Health Act, 1875, " drain means any drain of and used for the drainage of one building only." No general rule can be laid down as to whether a pair of semi-detached houses are " one building only " within the meaning of the above section or not, even though they be under one continuous roof. It is in each case a question of fact. HUMPHERY *v.* YOUNG - - - - - **Div. Ct. 44**

—— " Outgoings " — Reconstruction of drain— Liability - - - - - 873
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SHIPPING—*Bill of Lading—Harter Act (Act of Congress of U.S.A.* 1893), *s.* 3—" *Faults or Errors in Management of Vessel.*"

Butter was shipped on board the defendants' ship at New York for carriage to London under bills of lading which incorporated the Act of Congress known as the " Harter Act," by s. 3 of which it is provided that, subject to the conditions therein named, the owner of the ship shall not be " held responsible for damage or loss resulting from faults or errors . . . . in the management of said vessel." The butter was carried in insulated chambers connected with refrigerating machinery. It was delivered in London in a damaged condition, resulting from the negligence of the crew in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high :—

Held, that the neglect to keep the chambers sufficiently cooled during the voyage was a fault or error " in the management of " the " vessel " within the meaning of the bills of lading, and that the defendants were consequently excused. ROWSON *v.* ATLANTIC TRANSPORT COMPANY **Kennedy J. 114**

2. —— *Charterparty—Bills of Lading—Conclusive Evidence of Quantity delivered to Ship—Timber Cargo — Different Classes of Timber — Number and Measurement of each Class—Number and Measurement of Total Shipment — Short Delivery of one Class — Right to Reduction of Freight in respect of Shortage—Right to recover Value of Pieces Undelivered—Mode of estimating Value.*

A cargo of timber of different kinds, consigned to the defendants, was shipped on board the plaintiffs' vessel under a charterparty, of which one clause was, " Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship." The bill of lading of the cargo gave the number of pieces of deals and battens and the number of superficial feet and the like particulars of scantlings, deal-ends, and boards respectively. The bill of lading also gave the total number of pieces and of superficial feet. There was a short delivery of deals, but an overdelivery, which was taken over by the consignees, of scantlings and boards, the total number of pieces of timber delivered being slightly in excess of the total number given in the bill of lading. In an action by the shipowners to recover freight, in which the consignees counter-claimed for the value of the deals not delivered :—

Held, that the bill of lading was conclusive as to the number of pieces and the number of superficial feet in each class of timber, and that the consignees were entitled to a deduction on freight in the proportion that the number of pieces of deal not delivered bore to the number specified in the bill of lading :

Held, also, that the defendants were entitled on their counter-claim to recover the value of the deals not delivered, to be ascertained by taking

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the proportion that the number undelivered bore to the number specified in the bill of lading.

Spaight v. *Farnworth*, (1880) 5 Q. B. D. 115, approved. Mediterranean and New York Steamship Company *v.* A. F. & D. Mackay **C. A. 297**

3. —— *Charterparty — Exceptions — Fire — Applicability to Charterer.*

The exception of fire in a charterparty enures for the protection of the charterer as well as the shipowner. *In re* Newman & Dale Steamship Company and British and South American Steamship Company - - **Bigham J. 262**

4. —— *Charterparty—Freight—Lien on Sub-freight.*

A lien on sub-freight given to a shipowner by a charterparty can only be exercised before the sub-freight has been paid to the charterer of the ship or his agent. The lien confers no right on the shipowner to follow the sub-freight after it has been paid. Tagart, Beaton & Co. *v.* James Fisher & Sons. West Hartlepool Steam Navigation Company, Third Parties **C. A. 391**

5. —— *Charterparty—Warranty of Seaworthiness—Supply of Coal for Steamer—Provision that Charterers should provide Coal.*

Where it was provided by the terms of a charterparty, by which a steamer was chartered for a round voyage from Liverpool to the River Plate and back to the United Kingdom, that the charterers should provide and pay for all the coal:—

Held, that this provision did not relieve the shipowners from the obligation of seeing that the ship was in a seaworthy condition in respect of her supply of coal at the commencement of the each of the stages of the voyage. McIver & Co. *v.* Tate Steamers, Limited - - **C. A. 362**

6. —— *Mortgage — Mortgagee taking Possession — Right to Freight previously Earned but Unpaid.*

A mortgagee of a ship is not entitled to unpaid freight which became due previously to the date of his taking possession of the ship. Shillito *v.* Biggart - - **Walton J. 683**

7. —— *Seaman injured in Service of Ship—Expenses of Medical Attendance—Expenses after Seaman's Return to Home Port—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 207, *sub-s.* 1.

A shipowner is not liable under the Merchant Shipping Act, 1894, s. 207, sub-s. 1, for expenses of necessary surgical and medical attendance upon a seaman injured in the service of the ship incurred after the seaman has been brought back to a port of the United Kingdom. Anderson *v.* Rayner - - - - **C. A. 589**

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SOLICITOR — *Costs — Taxation — Parliamentary Agent—Costs of obtaining Private Act of Parliament—Practice—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*House of Commons Costs Taxation Act*, 1847 (10 & 11 *Vict. c.* 69)—*House of Lords Costs Taxation Act*, 1849 (12 & 13 *Vict. c.* 78).

Where a bill of costs delivered by a parliamentary agent, who is likewise a solicitor, relates exclusively to business done by him in the capacity of a parliamentary agent, and not in that of a solicitor, the bill cannot be referred for taxation under the Solicitors Act, 1843. In the Matter of Baker, Lees & Co. - **C. A. 189**

2. —— *Misconduct—Inquiry—Report of Committee of Incorporated Law Society—Right of Complainant to be heard by Court—Necessity of appearing by Counsel—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.

Sect. 13 of the Solicitors Act, 1888, by which an application to strike the name of a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their finding in a report to the High Court, provides that any person who but for the Act would have been entitled to apply to the Court to strike a solicitor off the rolls, or to require him to answer allegations, shall still be entitled so to apply, "and shall be entitled to be heard if the society brings the report of the committee before the Court":—

Held, that such an applicant could not be heard in person, but must appear by counsel.

Ex parte Pitt, (1833) 2 Dowl. 439; 39 R. R. 734, followed. *In re* A Solicitor. *Ex parte* Incorporated Law Society - **Div. Ct. 857**

3. —— *Treasury Solicitor—Direction to appear for Subject—Matter in which the Crown has an Interest—Right to Costs.*

On a rule for a mandamus to the defendant, in a matter in which the Crown had an interest, the Treasury Solicitor was directed to appear for the defendant, and he accordingly became the solicitor on the record. The rule was discharged with costs. Objection was taken on taxation that the defendant was not entitled to recover costs:—

Held, that the Treasury Solicitor is entitled to act, by direction of the Crown, for a subject, in any matter in which the Crown has an interest, and that the defendant was therefore represented by a duly qualified solicitor, and was entitled to recover his costs from the prosecutor. The King *v.* Archbishop of Canterbury - **C. A. 289**

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STOCK EXCHANGE — *Bankruptcy — Receiving Order—Stockbroker—Default on Stock Exchange —Administration of Assets by Stock Exchange Assignee—Right of Stock Exchange Creditor to petition in Bankruptcy.*

A member of the London Stock Exchange having become a defaulter, a Stock Exchange creditor, who has come in and has received dividends under the administration of the defaulter's assets by the official assignee of the Stock Exchange, and has also recovered judgment in an action for his debt, can maintain a petition in bankruptcy against the defaulter, founded on the balance of the judgment debt after deducting the dividends which he has received and for which he must give credit.

The Stock Exchange cessio bonorum does not operate as an accord and satisfaction or a release of the defaulter's debts. *Ex parte* Mendelssohn. *In re* Mendelssohn - - - **C. A. 216**

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STREETS — *Apportionment of Expenses—Local Government—Private Street Works—Completion of Works—Final Apportionment of Expenses—Frontager — Right to question Apportionment—Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *s.* 12.

By s. 12 of the Private Street Works Act, 1892, "When any private street works have been completed, and the expenses thereof ascertained," the urban authority's surveyor shall make a final apportionment of the expenses, which final apportionment shall be conclusive for all purposes, and the owners of premises affected thereby may, within one month after receiving notice thereof, object thereto upon the grounds (inter alia), or either of them, that the final apportionment has not been made in accordance with the section, and that there has been an unreasonable departure from the deposited specification, plans, and sections.

An urban authority employed a contractor to execute, under the powers given by the Act, works of paving, &c., in a street according to a specification, plans, and an estimate duly made and deposited. Being satisfied on the report of their surveyor, who had inspected the work from time to time during its progress and given certificates for payments on account to the contractor, that it had been satisfactorily completed, they paid the contractor the balance of the contract price, and the surveyor then made a final apportionment of the expenses among the owners, notice of which was served upon them. The appellant, an owner affected by the final apportionment, did not object thereto within one month after he received the notice; but the urban authority having, after the month had expired, taken summary proceedings to obtain payment of the sum apportioned upon him, he objected before the justices that the works had not been "completed" within the meaning of s. 12, because the road and footways of the street had not been formed and levelled, nor had they been ballasted or metalled to the thickness, or with the materials, specified in the specification, nor did the channelling and kerbing comply therewith, and that the surveyor had, therefore, no power to make a final apportionment of the expenses:—

Held, that the appellant could not take those objections before the justices, and that they were right in rejecting evidence in support of them. Hayles *v.* Sandown Urban District Council **Div. Ct. 169**

2. —— *Private Street—Execution of Works by Local Authority—Liability of Owner—Notice of Provisional Apportionment — Streets (Streets and Buildings)—Public Streets Works Act,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 12; *Schedule, Part I. —Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 267.

Where works are executed by a local authority under the provisions of the Private Streets Works Act, 1892, it is a condition precedent to the right of the local authority to recover from an owner of premises in the street his apportioned share of the expenses that notice of the provisional apportionment of the estimated expenses, as well as notice of the final apportionment of the ascertained expenses, shall have been served upon him. Wirral Rural District Council *v.* Carter - - - **Div. Ct. 646**

3. —— *Res Judicata — Estoppel — Private Street Works—Objections to Proposed Works—Determination that Street is a Highway—Subsequent Proceedings in respect of Street — Local Government — Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

In proceedings taken in 1898 under sections of the Wakefield Corporation Act, 1887, which are identical with ss. 6, 7, and 8 of the Private Street Works Act, 1892, for sewering, paving, &c., part of a certain street in the city, the justices determined, on an objection taken by frontagers, that the street was a highway repairable by the inhabitants at large. In 1900 fresh proceedings were taken under the same sections with the same object, and dealing with that part of the street which was the subject of the former proceedings and an additional length of the same street. On the hearing before justices an objection was taken by frontagers that the street was a highway repairable by the inhabitants at large:—

Held, that the matter was res judicata, and that the previous decision was a bar to the proceedings.

Judgment of the Divisional Court, [1902] 1 K. B. 188, reversed.

Reg. v. *Hutchings*, (1881) 6 Q. B. D. 300, distinguished. Wakefield Corporation *v.* Cooke **C. A. 417**

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TRADE UNION—*Application of Funds contrary to Rules—Action for Injunction by Individual Member of Union—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3.

Where a trade union, formed for the purpose (among others) of providing benefits for members, and registered under the Trade Union Act, 1871, were proposing to apply funds of the union to purposes not sanctioned by its rules, and in contravention of essential provisions of those rules, which defined the nature and objects of the union, and the trustees of the union were acquiescing in the application of the funds as aforesaid:—

Held, that an action was maintainable by an individual member of the union for an injunction to restrain such a misapplication of the funds, inasmuch as it was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, sub-s. 3.

By one of the rules of a trade union provision was made for the weekly allowance of strike pay to members, who were "permitted to cease work by the sanction of the association in accordance with the rules." A cessation of work by members of the union having taken place without the sanction of the association, its sanction was afterwards obtained for the continuance of that cessation as from a date subsequent to its original commencement:—

Held (by Vaughan Williams L.J., Stirling L.J., and Mathew L.J., Stirling L.J. doubting), that the rule did not authorize the union to allow weekly strike pay to the strikers subsequently to the sanction of the association being obtained as aforesaid.

By one of the rules of a trade union provision was made for the allowance of weekly strike pay in cases where members were "thrown out of employment" in consequence of any action legally taken by the union. Members of the union, who had been employed at a colliery, and who had struck of their own accord, and not in consequence of any action taken by the union, failed in an attempt made by them some time afterwards to obtain re-employment at the colliery, which failure was alleged to have been in consequence of action taken by the union:—

Held, that the rule could not be applied to their case, because they could not be said to have been "thrown out of employment" within its meaning. HOWDEN *v.* YORKSHIRE MINERS' ASSOCIATION - - - - - C. A. 308

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Cestui que Trust—Equitable defence—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 2, 3—*Rules of the Supreme Court, Order* XIX., *r.* 3.

In an action to recover a debt due to the plaintiff as a trustee, the defendant is entitled to set up as a defence that the cestui que trust is indebted to him in a sum for unliquidated damages exceeding the amount of the claim. BANKES *v.* JARVIS - - - **Div. Ct. 549**

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WATER—*Waterworks—Lands compulsorily taken—Compensation—Special Adaptability.*

In assessing compensation for land compulsorily taken for the purpose of making a reservoir, it may be right to take into consideration the fact that the land in question has peculiar natural advantages for supplying water to a district or area, apart from any value created or enhanced by the scheme or Act for appropriating the water to a particular local authority; and it is not necessary that it should be proved that the land in question could be similarly used by other specified local authorities. *In re* GOUGH AND ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD - - **Wright J. 574**

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